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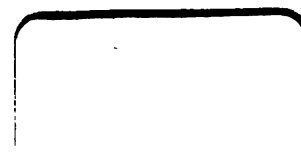

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# 6 CAL. UNREP.

# CALIFORNIA UNREPORTED CASES

BEING THOSE

DECISIONS DETERMINED IN THE SUPREME COURT AND THE DISTRICT COURTS OF APPEAL OF THE STATE OF CALIFORNIA

BUT NOT

OFFICIALLY REPORTED

WITH

ANNOTATIONS

SHOWING THEIR PRESENT VALUE AS AUTHORITY

REPORTED AND EDITED BY

PETER V. ROSS

Of the San Francisco Bar

Author of "Inheritance Taxation," "Probate Law and Practice," etc.

**VOLUME 6**

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1913

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# CASES DETERMINED

IN THE

# SUPREME COURT OF CALIFORNIA

BUT NOT

# OFFICIALLY REPORTED.

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## HOLLIDAY v. HOLLIDAY et al.*

L. A. No. 338; April 26, 1898.

53 Pac. 42.

**Malicious Prosecution—Termination of Action.**—An Allegation, in an action for malicious prosecution, that the prosecution on which the action is based had been finally determined in plaintiff's favor, is sufficient, without alleging, in addition, the means, as by writ of habeas corpus, by which that end was accomplished.

**Malicious Prosecution—Probable Cause.**—When a Prosecution, under Penal Code, sections 701–714, authorizing the arrest of a person charged with having threatened to commit an offense, results, after a hearing, in an order requiring the accused to give an undertaking to keep the peace, the order, unless it is shown to have been procured by fraud, is conclusive evidence of probable cause.

**Malicious Prosecution—Termination—Probable Cause.**—In an action for malicious prosecution, it appears that, in one of the prosecutions on which the action was based, the plaintiff was discharged on a writ of habeas corpus, on the ground of the insufficiency of the commitment, and a possible defect in the warrant; and, in the other, upon the statement that she could not give a bond and assurances that she would not harm defendants, who were seeking to compel her to give an undertaking to keep the peace, she was discharged on motion of the district attorney, on her own recognizance. Held, that an instruction that plaintiff's release upon the habeas corpus proceedings and the dismissal on the motion of the district attorney were each a sufficient termination of the prosecution, for the purposes of this action, going to show a want of probable cause, is error.

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*For subsequent opinion in bank, see 123 Cal. 26, 55 Pac. 703.

**Malicious Prosecution—Probable Cause—Advice of Counsel.**—A defendant in an action for malicious prosecution, who relies on the defense of probable cause by showing that he in good faith acted on the advice of counsel, after having disclosed to him all the material facts within his knowledge relating to the offense and the accusation, need not show that he also disclosed all the material facts bearing on the case which he could have ascertained by reasonable diligence, the other disclosures being sufficient.[1]

APPEAL from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Fannie L. Holliday against Edward F. and Mrs. M. P. T. Holliday. Judgment for plaintiff and defendants appeal. Reversed.

Wm. J. Hunsaker for appellants; James & Newby for respondent.

BELCHER, C.—This is an action to recover damages for malicious prosecution and false imprisonment, based on a proceeding instituted by defendants against plaintiff before a justice of the peace, under the provisions of sections 701 to 714 of the Penal Code. The complaint contains four counts. The first count alleges that on the nineteenth day of August, 1895, in the city of Los Angeles, the defendants falsely and maliciously, and without reasonable or probable cause, charged plaintiff before William Young, a justice of the peace within and for the township of Los Angeles, with having threatened to burn the personal property of defendants, and to shoot, stab and kill defendants, and that said defendants had just cause to fear the said threats would be carried into execution by said plaintiff if she was not restrained by the court, and procured said justice to issue a warrant for the arrest of plaintiff on said charge; and thereupon plaintiff was arrested under said warrant, and imprisoned in the county jail of Los Angeles county for the space of eight days. It is then alleged "that on the twenty-seventh day of August, 1895, upon petition of plaintiff for discharge

[1] Cited, as showing the tendency of decisions elsewhere than in Texas, in Missouri, Kansas & Texas Ry. Co. v. Groseclose, 50 Tex. Civ. 528, 110 S. W. 478, the court there saying: "In this state the rule is that advice of private counsel is not complete defense, but a fact to be considered by the jury on the issue of malice and probable cause."

upon a writ of habeas corpus, which was duly issued and returned, the said plaintiff was discharged from custody, and the said prosecution is wholly ended and determined." The second count alleges that on the twenty-seventh day of August, and immediately after plaintiff's discharge, as alleged in the first count, the defendants again procured the said justice to issue a warrant for the arrest of plaintiff upon the same charge set out in the first cause of action; and thereupon she was arrested under said warrant, and imprisoned for three hours, until released upon her own recognizance to thereafter appear and answer said charge; and "that on the thirty-first day of August, at the request of counsel for defendants, and on motion of the district attorney, the plaintiff was discharged from custody without examination, and said prosecution is wholly ended and determined." The third and fourth counts, by the instruction of the court, were withdrawn from the consideration of the jury, and they need not therefore be considered. Defendants demurred to each of the counts contained in the complaint, and their demurrer was overruled. They then answered, denying the allegations of the first and second counts relating to malice, want of probable cause, and damage, and, as a further defense to the first count, alleged that, after an examination of the charge before the justice of the peace, the proceeding was finally determined on August 20th, and, as showing such final determination, set up the following order made by the justice:

"It appears to me that there is just reason to fear the commission of the offense within mentioned. I order that you, the said defendant, enter into an undertaking in the sum of $1,000, with two sufficient sureties, to keep the peace toward the people of the state of California, and particularly toward the affiants.

"Done in open court, this 20th day of August, 1895.

"WM. YOUNG,

"Justice of the Peace."

And, in addition to the denials of the allegations of the second count, defendants alleged that they consented to the dismissal of the second proceeding solely for the reason that they and their counsel were assured by the counsel for the plaintiff in this action (the defendant in said proceeding) that she would not carry the threats, for the making of which she was charged, into execution, or otherwise harm or molest

the persons or property of defendants. The case was tried before a jury, and a verdict was rendered in favor of the plaintiff for the sum of $500, on which judgment was entered. From that judgment and an order denying their motion for a new trial, defendants have appealed.

The law is well settled that, to maintain an action of this kind, the plaintiff must allege and prove affirmatively malice and want of probable cause on the part of the defendant in instituting the proceeding which is made the basis of the action, and that the same has been finally determined in favor of the plaintiff. Appellants contend that the allegation in the first count of the complaint that upon a writ of habeas corpus, which was duly issued and returned, plaintiff was discharged from custody, and the prosecution was wholly ended and determined, was not sufficient to show that the proceeding had been finally determined in favor of the plaintiff, and therefore their demurrer to that count should have been sustained. The argument is that it does not appear that the petition for the writ was presented to any court or judge having jurisdiction to issue the writ, or that an order was made by any court or judge directing the discharge of plaintiff. But it was only necessary to allege that the prosecution had been finally determined, and not the means by which that end was accomplished. The statement that plaintiff was discharged upon a writ of habeas corpus, which was duly issued and returned, and the prosecution was wholly ended, should therefore, we think, be held sufficient.

It is further contended that the order of the justice of the peace made August 20th, requiring the plaintiff to enter into an undertaking to keep the peace, was a conclusive determination that there was probable cause for the institution of the proceeding which resulted in the making of such order, and was not subject to collateral attack. And, in accordance with this contention, defendants requested the court to instruct the jury that the order referred to, made by the justice upon the information before him, was "conclusive evidence that there was probable cause for lodging said information and prosecuting said proceeding." The court refused to give the instruction asked, and, at the request of the plaintiff, instructed the jury that "the fact that Justice Young rendered judgment requiring the plaintiff in this action to give bail in the sum of $1,000 to keep the peace is no bar to this action

by the plaintiff," and that "the defendants cannot shield themselves on the first and second causes of action behind the action of Justice Young in issuing the warrants of arrest and committing plaintiff, if the facts stated in the information were false, and not believed by the defendants to be true." It is claimed by appellants that the court erred in refusing to give the instruction requested by them, and in giving the instructions requested by respondent, and many cases are cited on both sides as to the effect, as conclusive evidence, of judgments and orders of courts. Without reviewing the cases cited, we deem it enough to say that, while there is some apparent conflict in the decisions, the prevailing rule seems to be that when a person is charged before a competent court having jurisdiction of the matter, and is tried and found guilty, the judgment rendered, unless it is shown to have been obtained by means of fraud, is conclusive evidence of probable cause for making the charge, even though it is afterward held to be unauthorized and reversed on appeal. It has, however, been held by this court that, in actions for malicious prosecution, the fact that the plaintiff, after examination, has been held to answer by the examining magistrate, is prima facie, but not conclusive, evidence of the existence of probable cause for the prosecution complained of: Ganea v. Railroad Co., 51 Cal. 140; Diemer v. Herber, 75 Cal. 287, 17 Pac. 205. Under the provisions of the Penal Code before referred to, authorizing the arrest of a person charged with having threatened to commit an offense against the person or property of another, the order of the magistrate, made after a hearing, and requiring the accused person to enter into an undertaking to keep the peace, would seem to have the force and effect of a final judgment and determination that there was just reason to fear the commission of the offense, and that the penalty provided should be imposed. If this be so, then such an order goes further and has a wider effect than an order made by an examining magistrate holding a party to appear and answer for some alleged offense before a trial court. We conclude, therefore, that appellants' contention on this point must be sustained, there having been no evidence that the said order of the justice was procured by fraud.

In actions of this character, what constitutes probable cause is always a question of law for the court. As said in Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937:

"Malice is always a question of fact for the jury, but whether the defendant had or had not probable cause for instituting the prosecution is always a matter of law, to be determined by the court. If the facts upon which the defendant acted are undisputed, the court, according as it shall be of the opinion that they constituted probable cause or not, either will order a nonsuit (or direct a verdict for the defendant), or it will submit the other issues to the jury; but, whether admitted or disputed, the question is still one of law to be determined by the court from the facts established in the case. If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury. . . . . The court cannot devest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that, if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly."

In accordance with the law as above declared, the court, at the request of plaintiff, very briefly and meagerly grouped the facts which would constitute a want of probable cause, and instructed the jury that, if they found those facts to be true, the verdict should be in favor of the plaintiff. And, at the request of defendants, the court very fully grouped the facts which the evidence tended to prove, and instructed the jury that, if they found those facts to be true, then they constituted probable cause for lodging the information against plaintiff, and her arrest and prosecution, and the verdict should be for defendants on both causes of action. It is objected that the facts, as grouped at the request of plaintiff, were insufficient to show a want of probable cause, and that this was a fatal error, which calls for a reversal. But all of the instructions must be read together, and, when so read, we fail to see that the jury could have been misled. The jury must be presumed to have understood that if the facts, as grouped at the request of defendants, were not found to be

true, then there necessarily must have been a want of probable cause.

At the request of the plaintiff, the court instructed the jury "that the release of plaintiff upon habeas corpus proceedings was and is a sufficient termination of the first prosecution; and the dismissal by the court on the motion of the district attorney on August 31, 1895, was a sufficient termination of the second prosecution, for the purposes of this action." In view of the evidence, this instruction, we think, was erroneous. Mr. Jones, who was the attorney for plaintiff in the habeas corpus proceeding before Judge Shaw, testified: "The ground upon which Judge Shaw discharged Mrs. Holliday was, as I remember, that the commitment was improper. It wasn't necessary to discuss the question of the sufficiency of the evidence, as she was discharged on account of the insufficiency of the commitment, and possibly a defect in the warrant. I think the main point that we pressed the most heavily was that the warrant of commitment did not conform to the order of commitment, and therefore she was unlawfully committed to jail, and she was therefore discharged." And as to the second discharge, it was proved that, immediately after plaintiff's second arrest, she and her attorney went to the justice's office, and there found Mr. Williams, the deputy district attorney; and that after consultation between the attorneys, and a statement by her attorney that she could not give a bond in any sum, and an assurance by her and her attorney that she would not do any harm to defendants, she was, on motion of the district attorney, released by the justice on her own recognizance. This being so, it certainly did not appear that either one of the proceedings against the plaintiff had been finally determined in her favor.

The court also, at the request of plaintiff, instructed the jury as follows: "The defendants rely upon the advice of counsel as one of their defenses to the causes of action for malicious prosecution, and upon this point the court instructs the jury that whether or not the defendants did, before instituting the proceedings, make a full, fair, and honest statement to their attorneys of all the material facts bearing upon the facts stated in the informations laid before Justice Young of which they had knowledge, or which they could have ascertained by reasonable diligence, and whether, in commencing

such proceedings, the defendants were acting in good faith upon the advice of their counsel, are questions of fact to be determined by the jury from all the evidence and circumstances proven in the case; and, if the jury believe from the evidence that the defendants did not make a full, fair and honest statement of such facts to their counsel, then such advice cannot avail them anything in this suit." By this instruction, the court, in effect, charged the jury that when, in an action for malicious prosecution, the defendant relies upon the advice of counsel as a defense for instituting the proceeding complained of, he must, in order to avail himself of that defense, prove to the satisfaction of the jury that, before instituting the proceeding, he made a full, fair and honest statement to his counsel of all the material facts bearing upon the charge of which he had knowledge, or which he could have ascertained by reasonable diligence, and that he acted in good faith upon the advice of the counsel. In Dunlap v. Insurance Co., 109 Cal. 365, 42 Pac. 29, instructions of similar import were given by the court, and held to be erroneous, and, for the error in giving them, the judgment was reversed. The court, after a review of the authorities, said: "Assuming that in seeking the advice of counsel, and in acting thereon, he has acted in good faith, and has disclosed all the facts within his knowledge relating to the offense and the accusation, his defense of probable cause will be established, even though the defendant should show at the trial other facts sufficient to secure his acquittal, and which might have been ascertained by the prosecuting witness if he had made diligent inquiry therefor. It is not necessary that he shall institute an investigation of the crime itself, or seek to ascertain whether there are other facts relating to the offense, or try to find out whether the accused has any defense to the charge. He is not required to exhaust all sources of information bearing upon the facts which have come to his knowledge, for that would be to require him to perform the office of the committing magistrate, and thus thwart the very purpose of the law in inducing him to seek its immediate vindication for crimes committed against it. There are expressions in some opinions to the effect that, in addition to the facts within his knowledge, he must also have exercised reasonable diligence to ascertain whether there are any other facts bearing upon the charge; but, in an extended examination of the authori-

ties, we have not been able to find any case in which it has been decided that such diligence must be exercised, or where the prosecuting witness has been held liable for failure to ascertain whether there were any other facts bearing upon the case." The case of Sandell v. Sherman, 107 Cal. 391, 40 Pac. 493, cited by counsel for respondent, does not sustain their claim that the instruction under review was not erroneous. In that case an instruction was given which stated that if the defendants "made a full and fair statement of all the facts of that case to their counsel," and he advised, etc., and they acted on his advice, "it is a good defense in this case." It was urged that the instruction was erroneous, for the reason, among others, "that it does not charge that they should have stated to the attorney all the facts within their knowledge, or which they reasonably could have obtained." But, tested by the general rule in such cases, the court failed to see any serious objection to the instruction, and held it to be sufficient. Following the law as declared in the Dunlap case, it must be held here that the instruction under review was erroneous in so far as it charged, in effect, that the defendants could not avail themselves of the advice of counsel unless the jury should find from all the evidence and circumstances proven in the case that, before instituting the proceedings, they made a full, fair and honest statement to their attorneys of all the material facts bearing upon the case "which they could have ascertained by reasonable diligence."

For the errors above noted, the judgment and order appealed from should be reversed and the cause remanded for a new trial.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed and the cause remanded for a new trial.

## OHLANDT et al. v. JOOST et al.

S. F. No. 1442; May 3, 1898.

53 Pac. 213.

**Appeal.—Where a Motion to Dismiss an Appeal Involves an examination into its merits, the motion will be denied, with leave to renew it on submission of the cause.**[1]

APPEAL from Superior Court, City and County of San Francisco.

Action by one Ohlandt and others against one Joost and others. On motion to dismiss an appeal. Denied.

Mullany, Grant & Cushing for appellants; A. F. Morrison for respondents.

PER CURIAM.—It appearing that a determination of the motion to dismiss the appeal in this case involves the necessity of an examination into the merits of the appeal, it is ordered that said motion be, and it is hereby, denied, with leave to the respondents to renew such motion in submitting said cause upon the merits.

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## MODOC COUNTY v. MADDEN, County Treasurer, et al.*

Sac. No. 314; May 4, 1898.

53 Pac. 268.

**Appeal.—A County Brought Suit to Restrain Its Treasurer from** paying a certain warrant, and, upon the hearing, the court dissolved the preliminary injunction, and denied a perpetual injunction; and two days later the county gave notice of appeal, but did not perfect its appeal for over three years. Held, that as there was no appear-

[1] Cited and followed in Re Sharp's Estate, 10 Cal. App. 3, 100 Pac. 1071, where it is said a motion to dismiss on appeal will be denied when the whole controversy is based on the question of the jurisdiction of the probate court, and its determination would involve the merits.

*Rehearing denied.

ance by respondent, and as the warrant was doubtless paid, the case would not be considered on its merits, and the judgment would be affirmed.

APPEAL from Superior Court, Modoc County.

Action by the county of Modoc against John Madden, county treasurer, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Attorney General Fitzgerald for appellant; D. W. Jenks and Goodwin & Stewart for respondents.

PER CURIAM.—On the fifteenth day of July, 1893, the board of supervisors of the county of Modoc allowed and approved two claims presented by the respondent John Stanley for supplies furnished by him to the county hospital, aggregating about $60. The county auditor drew his warrant on the county treasurer in favor of Stanley for this amount. This action was instituted by the district attorney, on behalf of the county, to restrain the treasurer from paying the warrant. It was averred that there were moneys in the treasury available for the purpose, and amply sufficient to pay the warrant, but that it was an illegal and void demand against the county. The argument in this regard is that section 4047 of the Political Code provides that the supervisors must contract for all supplies for county institutions, and that the supplies in payment of which this warrant was drawn had not been furnished under contract. The defendants answered, denying that the claims were unauthorized in law. Upon August 1, 1893, the cause was submitted for decision, without the introduction of evidence upon either side. On the twenty-first day of August the court made and entered its judgment dissolving the preliminary injunction, denying a perpetual injunction, and dismissing the action, with costs to defendants. Two days later—upon August 23, 1893—the plaintiff served and filed its notice of appeal. There the matter was allowed to rest until November 7, 1896, when the record was certified to by the clerk of the court; and following this, upon December 16, 1896, the transcript was filed. The appellant has filed a brief attacking the validity of the claim upon the ground indicated. Respondent makes no reply, doubtless for the reason that he has long since received the money upon his claims, and has no further interest in the litigation.

Under this state of facts, we must decline either to disturb the judgment, or to consider it upon its merits. The rules of this court are designed, not alone to protect the rights of litigants, but to aid the prompt and proper administration of justice. The remissness of appellant in prosecuting its appeal has resulted in an inexcusable delay of more than three years in filing the transcript. During this time there has been no restraint upon the treasurer, and, beyond peradventure, the warrant has long since been paid, and the respondents may reasonably have concluded that the whole matter had been abandoned. In consequence, this court is deprived of the material assistance, to which it is entitled in the consideration of the question, of a brief from the prevailing party. By reason of the laches of the appellant, it may fairly be concluded that the proposition here involved is, so far as these litigants are concerned, nothing more than a moot question; and this court should not be called upon to decide so important a proposition, under the indicated circumstances. The judgment is therefore affirmed.

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## BIXBY v. CRAFTS et al.

Sac. No. 515; May 31, 1898.

53 Pac. 404.

**Pledge—Lien—Conversion.—A Pledgee of Stock,** even if he converts it, by depositing it in escrow under an agreement to convey it to one on exercise of his option of purchase on all the corporation's property, does not thereby lose his lien, under Civil Code, section 2910, the pledgor having waived the tort by electing to treat the pledgee's contract as authorized.

**Limitations—Necessity of Pleading.—The statute of limitations,** to be availed of, must be pleaded.

APPEAL from Superior Court, Sierra County.

Action by A. M. Bixby against S. S. Crafts and others. From the judgment plaintiff appeals. Affirmed.

F. D. Soward for appellant; F. D. Wehe and S. B. Davidson for respondents.

BRITT, C.—On February 4, 1880, plaintiff transferred in pledge to defendant S. S. Crafts certain shares of stock in the Hope Mining Company, a corporation, as security to Crafts for past and future advances of cash and merchandise had and to be had of him by plaintiff. On August 1, 1895, said mining company entered into a contract with defendant F. W. Page, whereby the latter obtained the option to purchase all the company's property within the period of eighteen months, upon terms specified in the contract. Crafts and other holders of the company's stock ratified such contract, and agreed, on the consummation thereof by Page, to convey to him their several holdings of stock, the certificates of which they deposited in escrow pending the exercise of Page's option. Plaintiff commenced this action on November 13, 1895. In his amended complaint (to which said corporation was made a party defendant) he averred, among other things, that he waives "the tort of defendant S. S. Crafts in so executing the aforesaid agreement, and elects to treat such contract and deposit of the aforesaid stock in escrow as binding upon himself, save and except that his rights thereunder be protected by a decree of this court." He prayed that an account be taken to determine the amount due from him to Crafts; that any balance found due be paid by Page out of money to become payable from him under said contract with the Hope Mining Company; and that he (the plaintiff) be subrogated to the rights of Crafts therein. There was a cross-complaint by Crafts, to which pleading plaintiff answered. By its judgment the court ascertained the amount due from plaintiff to Crafts, and decreed that plaintiff be allowed to redeem his stock by paying such amount within ninety days; otherwise that the stock be sold by the sheriff to raise the same, balance of the proceeds of sale, if any, to be paid to plaintiff, any dividends accruing meanwhile to be used in effecting redemption, and plaintiff to receive any excess thereof.

On appeal it is argued that by the contract with Page, and by depositing the certificate of stock in escrow, Crafts converted the stock, and so lost his lien as pledgee: Civ. Code, sec. 2910. But plaintiff seems to overlook the fact that by his pleading he waived the tort of Crafts in this behalf (if tort there was), and elected to treat the contract with Page as one Crafts had authority to make. It is said also that Crafts' account against plaintiff was barred by the statute of limita-

tions, and hence that his lien on the stock was lost: Civ. Code, sec. 2911. It is sufficient reply to say that plaintiff did not in his answer to the cross-complaint, or elsewhere, plead the bar of the statute. Plaintiff further complains that the court did not subrogate him to the right of Crafts under the contract with Page; but by redeeming the stock, as allowed by the judgment, he would become entitled as holder thereof to his proportionate part of all the benefits derived by the corporation from the contract with Page, and Crafts was entitled to nothing more than that. It is not perceived how plaintiff could have any other subrogation. The judgment fully protected the rights of plaintiff, and should be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## RUBENS v. MEAD.

L. A. No. 337; May 31, 1898.

53 Pac. 432.

**Broker.—A Broker Who Fraudulently Represented** to the principal, whose money he was loaning, that the security was good, is liable, though the principal was in a position to have examined the security.

**Broker.—The Recovery in Action by Principal Against Broker,** for fraudulently representing that the worthless property on which loan was made was good security, is not affected by the question whether he shared the money with, or delivered any part of it to, the pretended borrower.

**Continuance.—There is No Error in Denying Continuance** because of defendant's sickness, there having been a previous continuance on this ground, on stipulation that there should be no further postponement on that ground, and it not appearing that defendant's presence would have been of any avail.

APPEAL from Superior Court, Los Angeles County.

Action by Sarah V. Rubens against Mary N. Mead, executrix. Judgment for plaintiff. Defendant appeals. Affirmed.

W. Rose and C. Edgerton for appellant; W. D. Gould and J. D. Pope for respondent.

HARRISON, J.—The defendant's testator, Alexander J. Mead, was engaged in the business of loaning money upon real estate security for others who might intrust such business to him, and advising them in reference thereto, and was employed by the plaintiff for that purpose. Under his advice, and upon his representations as to the value and condition of the land offered as security, the plaintiff made certain loans of money, for which he took in her name the promissory notes and mortgages of the borrowers. The land so offered was of no value, and the loans were not repaid. The plaintiff brought this action to recover the amount of money so loaned, upon the ground, as alleged in her complaint, that, at the time the loans were made, Mead knew that the land was worthless, and that the representations made by him and his advice to her were made and given with the intention and purpose on his part to defraud her of the money. The court found that the allegations of the complaint were true, and rendered judgment in favor of the plaintiff, from which the defendant has appealed, upon the ground that the decision is not sustained by the evidence.

We are of the opinion that there was sufficient evidence before the court to sustain its decision. The appellant questions its sufficiency only in reference to one of the loans—the one made to Harris—and urges that the statements of Mead were only matters of opinion, and that, as the plaintiff had full opportunity to test their correctness by examining the land for herself, she could not hold him liable for any erroneous opinion. Mead, however, was the agent of the plaintiff, and was not dealing with her as a contracting party, and the rules applicable to statements made by a vendor of the quality of the article offered by him have no application. The plaintiff was entitled to rely upon the statements of Mead. He was bound to act with the utmost good faith toward her, and is not at liberty to say that she would not have been defrauded if she had been more vigilant, and had been suspicious of his good faith. It was sufficiently shown that the land was worthless, and the evidence justified the court in finding that Mead knew this fact, and fraudulently represented to the plaintiff that it was a good security for the loan. When he visited her

for the purpose of inducing her to make the loan, he told her that the security was thoroughly good, and that he knew it was. It is true that he had previously told the plaintiff's daughter that he had not seen the land; but he also told her that he had himself owned the land, and had just sold it to Harris, and that he considered it a desirable loan. Harris said to her that he was unable to show her the land, but referred her to one Gardemeyer, who appears to have had relations with Mead in some respect. Mead did not pretend to have much knowledge of Harris—only that he thought him a straightforward business man—but impressed upon the plaintiff that the security of the land was all that she needed to be concerned about.

As the cause of action against Mead is not for the money which he received from the plaintiff, but for fraudulently inducing her to part with it, it is immaterial whether he shared it with Harris, or delivered it all to him. He stated that he had "just sold" the land to Harris, and manifested to the plaintiff a great desire that she should make the loan; and, as the money was loaned to Harris through him, it was presumptively delivered to him as a part of the scheme to defraud the plaintiff. Harris made no appearance after the loan had been made, and could not be found by the plaintiff.

The court did not err in refusing to grant a continuance on the ground of the defendant's illness. The cause had been once continued upon this ground, upon the stipulation that no further request for a postponement on that ground should be made; and it was not shown that her presence would be of any avail or that she knew of any fact bearing upon the case. The judgment and order are affirmed.

We concur: Garoutte, J.; Van Fleet, J.

## STUFFLEBEEM et al. v. HICKMAN et al.

Sac. No. 410; May 31, 1898.

53 Pac. 438.

**Trespass—Claimants Under Lessee.—Owner of Land Who Leases it with understanding that the lessee, if he cannot keep stock of strangers off, shall charge them for the use thereof, cannot maintain trespass against one who, on his cattle intruding thereon, arranges with the lessee to use the land for his stock for the season for a certain amount; and it is immaterial whether the money so collected belonged to the tenant or land owner.**

APPEAL from Superior Court, Tulare County; Wheaton A. Gray, Judge.

Action by J. H. Stufflebeem and others against A. W. Hickman and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

Chas. G. Lamberson for appellants; Geo. G. Murry for respondents.

SEARLS, C.—This action was brought in a justice's court to recover damages for trespass upon real property, by entry thereon with cattle, horses and other stock, and depasturing the land from May 1, 1893, to November 27, 1893. The cause was, upon the coming in of a sworn answer showing that the trial would involve the issue of possession to the locus in quo, transferred to the superior court for trial. A jury trial was had and a verdict rendered in favor of defendants, upon which judgment was entered for costs. Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial. Defendants A. W. Hickman and Henry Mentz answered jointly, and, among other things, admitted the ownership by plaintiffs of the two sections of land described in the complaint, to wit, sections 27 and 33 in township 20 S., range 29 E., Mt. D. B. and M., county of Tulare, state of California. They denied, however, that plaintiffs were in the possession thereof, or entitled to the possession thereof, during the period when the alleged trespasses were charged to have occurred. On the contrary, they averred that plaintiffs leased said lands to one John McKiernan, who was in

possession thereof by virtue of said lease during all of said time; that said McKiernan sublet the same to them, etc. In other words, they claimed to have been lawfully in possession as subtenants under John McKiernan, who was lawfully there.

The only question in the case worthy of comment relates to the sufficiency of the evidence to support the verdict. The testimony was somewhat brief, and by no means conclusive; but, such as it was, giving full credence to that of the defendants, as the jury doubtless did, and as in the case of a conflict we are bound to do, in favor of the verdict, we think it sufficient to support the conclusion reached by the jury. The testimony of J. M. McKiernan was in substance that in 1893 he considered he had a verbal lease of the land from plaintiffs; that "he made the lease with John Stufflebeem, one of plaintiffs." He says: "I told John Stufflebeem that I wanted to gather my cattle, and wanted a place to put them, and that I would keep the stock off his land if he would let me use it. He said, if I did not come back on him for pay, all right. I said if I could not keep the stock off the land, I would make them pay for it." It further appeared that the stock of these defendants and of one Hubbs did intrude upon the land, and that thereupon McKiernan arranged with these defendants for them to use the land for their stock for the season, in consideration of twenty dollars, which they paid, and pastured their stock thereon from the early spring until, say, July, when they took it away. A similar arrangement was made and a like payment had from Hubbs. It also appeared that McKiernan was to repair the fence, which he claimed he did. That McKiernan was in possession, and that he sublet to defendants, was not seriously disputed. The conduct of plaintiffs in the premises also lends strength to the theory of defendants. For nearly three years after these transactions the sole claim of plaintiffs seems to have been that they were entitled to have from McKiernan the $40 which he had recovered from the subtenants. Failing to recover this, the present action of trespass was brought.

The case of Rogers v. Duhart, 97 Cal. 500, 32 Pac. 570, is relied upon by plaintiffs as in point, and as conclusive in their favor. In that case it was apparent that the defendant had clearly violated the terms under which he was permitted to depasture the land. In this case, we think, the

jury was justified in finding from the evidence and conduct of the parties that it was understood that, if McKiernan could not keep the stock of strangers off the land, he was to charge them for the use thereof. Whether or not the plaintiffs were entitled to the moneys thus collected by McKiernan is a question not necessary to be determined in this action. We recommend that the judgment and order appealed from be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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## FARMERS & MERCHANTS' BANK OF STOCKTON v. RICHARDS et al.

Sac. No. 251; May 31, 1898.

53 Pac. 439.

**Notes—Fraud as Defense.—No Defense to Note is Shown** by answer alleging that, by false representations of plaintiff's officers, defendant was induced to make the note in payment of others previously given for money borrowed by him from plaintiff, no damage being shown.

**Notes.—Fraudulent Representations, to be Defense** to note, must be such as to cause defendant to execute the note.

APPEAL from Superior Court, San Joaquin County; J. K. Law, Judge.

Action by the Farmers & Merchants' Bank of Stockton against L. A. Richards and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Van R. Paterson and Jas. A. Louttit for appellants; Budd & Thompson and Nicol & Orr, for respondent.

BRITT, C.—Plaintiff, a corporation, sued in this action on a promissory note for the sum of $2,703, dated October 6, 1894, made by defendants in plaintiff's favor, and secured by pledge of certain shares of stock, the property of defend-

ant Richards. Judgment was for plaintiff, directing the sale of the stock, and against defendants, personally, for the deficiency, if any, to remain after applying the proceeds of sale to the amount due on the note, etc. The question here is on the propriety of an order of the court below sustaining a demurrer to defendants' answer.

It was alleged in the answer, in substance, among other things, that, at and prior to the date of the note, D. S. Rosenbaum, P. B. Fraser and D. A. Guernsey were officers of the plaintiff, and were the general managers of its affairs; that the same three persons were copartners of defendant Richards in the business of farming; that at said date such copartnership was indebted to said Richards in a sum exceeding $8,000, as his said copartners and also the plaintiff well knew; that with the intent to procure the execution of said note, and of defrauding said Richards, his copartners, the said Guernsey, Rosenbaum and Fraser, falsely represented to him that he had no credits to his account with said copartnership as one of the members thereof, but was indebted to the same; that Richards, believing such representations to be true, and having no knowledge of the true state of the partnership accounts, "made and executed the promissory note set forth in the complaint herein on the sixth day of October, 1894, in payment of other notes theretofore given by the defendant Richards to plaintiff for money borrowed by him from plaintiff"; that he would not have executed the note but for the said false representations; and that the other defendant, Loughead, signed the note merely as surety for Richards. It was further averred that said note is held by plaintiff in trust for the sole benefit of Guernsey, Rosenbaum and Fraser, "for the fraudulent purposes hereinabove alleged." In the last analysis the answer stated no more than that, by the alleged false representations of plaintiff's officers, defendant Richards was induced to make the note in suit in payment of other notes previously given for money borrowed by him from plaintiff. How Richards was injured by this novation is not made to appear. His later obligation is not shown to have been more onerous than the former ones. Fraud without injury gives, in general, neither ground of action nor defense. Again, why should the information that Richards was indebted to the partnership of Guernsey, Rosenbaum, Fraser & Richards have con-

strained him to execute the note to plaintiff? The relation of cause and effect between the alleged false representation and the execution of the note to plaintiff does not appear from the nature of the alleged transactions, or from any other averments of the answer. That such relation existed was essential to the defense: Kerr, Fraud & M., Bump's ed., p. 74; Byard v. Holmes, 34 N. J. L. 296. The allegation that plaintiff holds the note in trust for Richards' copartners, construed with reference to other parts of the answer, is but a statement of matter of law unsupported by averments of fact. The judgment should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## ROSENTHAL et al. v. PERKINS et al.

Sac. No. 346; May 31, 1898.

53 Pac. 444.

**Attachment—Redelivery Bond—Assignments for Creditors.**—Code of Civil Procedure, section 555, provides for the release of attached property on the giving of a bond for redelivery to the proper officer, if judgment be for plaintiff. Laws of 1880, chapter 87, section 17, makes an assignment within one month after the attachment operate as a dissolution thereof, and section 45 permits plaintiff who had a valid lien of attachment on property released under a redelivery bond to prosecute the case to final judgment in order to fix liability of sureties. Held, that section 45 does not apply to attachments within one month preceding the assignment, the sureties being released by dissolution of the attachment.

APPEAL from Superior Court, Madera County; W. M. Conley, Judge.

Action by N. Rosenthal and L. Kutner, partners, against R. E. Perkins and others. From a judgment for plaintiffs and from an order denying a new trial defendants appealed. Reversed.

L. L. Corey and Wm. T. Searles for appellants; Francis A. Fee for respondents.

HAYNES, C.—On August 18, 1893, the plaintiffs in this action commenced an action in justice's court against one James Brusie to recover the sum of $269.82, and procured a writ of attachment to issue, and the same was levied on personal property of the defendant, Brusie. On August 21st Brusie executed a redelivery bond, upon which the defendants in this action were sureties. The said bond or undertaking was conditioned as required by section 555 of the Code of Civil Procedure, and upon its execution the constable released the property. The foregoing facts were formally and sufficiently alleged in the complaint, and the plaintiffs then proceeded to allege that afterward, on the sixth day of September, 1893, Brusie, upon his own petition, was, by an order of the superior court of Madera county duly given and made, adjudged an insolvent debtor; that afterward said superior court made an order permitting the said suit of the plaintiffs against Brusie to be proceeded with "for the purpose of fixing the liability of the said sureties, defendants herein, upon said bond or undertaking given for the release of said attached property, and for no other purpose"; that on September 25, 1893, judgment was rendered by the justice of the peace against Brusie for the sum of $317.32, including interest and costs; that afterward plaintiffs demanded of Brusie and of his assignee in insolvency, and of each of the said sureties, "the return of the property attached in accordance with the conditions of said undertaking, or that they pay the value thereof"; but that each of them refused to comply with such demand, and prayed judgment for said sum of $317.32, with interest and costs. A demurrer to the complaint was overruled, and the defendants answered, alleging substantially the same facts concerning Brusie's insolvency which were alleged in the complaint. Defendant Perkins pleaded his discharge in insolvency. The cause was tried by the court, findings were filed following the allegations of the complaint, and judgment was entered thereon for the plaintiffs. The defendants appeal from the judgment, and from an order denying a new trial.

The question presented in this case is whether the adjudication of Brusie's insolvency within thirty days after the attachment was issued, and after the redelivery bond was executed, and the property released from the attachment thereunder, operated to relieve the sureties thereon from liability.

That the adjudication of insolvency did have that effect, I think, is clear. Section 17 of the insolvency act of 1880, then in force, provides that the "assignment shall relate back to the commencement of the proceedings in insolvency, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Such assignment shall operate to vest in the assignee all the estate of the insolvent debtor not exempt by law from execution": Laws 1880, c. 87. It has been held in other jurisdictions that the dissolution of the attachment discharges the obligation of the sureties in a redelivery bond: See Drake, Attachm., secs. 341b, 341c, and cases there cited. Whether that is true here in cases where the attachment is dissolved upon motion of the defendant upon the ground that it was improperly or irregularly issued, we need not inquire, though all the cases cited by Drake under said sections were cases of bankruptcy and cases of like character, where the redelivery became impossible by operation of law; and in that class of cases I think the author's conclusion is sound, and the case before us is of that class This is apparent upon the face of section 555 of the Code of Civil Procedure, under which the bond here in suit was given, and from the condition of the bond itself, which is "that, in case the said plaintiff recover judgment in said action, the defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, or will pay," etc. The attachment having been absolutely dissolved by the adjudication of insolvency, and as no writ of execution could issue upon the judgment, there was no "proper officer" to whom the defendant could deliver the property, and hence the demand required the defendant to do a thing which by operation of law had become impossible, and the failure to do it could give no right of action upon the bond. The demand may be made by the plaintiff in the action as well as by the officer, but it is necessary that there should be an officer clothed with authority to receive the property and sell it: Brownlee v. Riffenburg, 95 Cal. 447, 30 Pac. 587. This the officer could not do without an execution.

Besides, section 552 of the Code of Civil Procedure provides: "If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section 540 or section 555, or he may proceed, as in other cases, upon return of an execution"; and in Brownlee v. Riffenburg, 95 Cal. 448, 449, 30 Pac. 588, it is said this section "in effect declares that unless or until an execution is issued and returned, no such prosecution shall be had"; that is, that said section makes the issuance and return of an execution a condition precedent to the right to commence an action upon the bond. This is the general rule, and applies in all cases except the one which will be presently noticed. Respondents cite the last clause of section 45 of the insolvent act, which reads: "Provided, that where a valid lien or attachment has been acquired or secured in any such action, and an undertaking has been offered and accepted in lieu of such lien or attachment, the case may be prosecuted to final judgment for the purpose of fixing the liability of the sureties upon such undertaking; but execution against the insolvent upon such judgment shall be stayed." It is contended that this provision authorizes this action against the sureties. It will be observed, however, that section 17 of the act operates to dissolve only those attachments "made within one month next preceding the commencement of insolvency proceedings." Attachments made more than one month before insolvency proceedings are commenced are not affected, and therefore are not dissolved, but remain valid for all purposes. In such case the property attached is not released by operation of law, and the attaching creditor has all the rights and remedies he would have had if the defendant in the action had not been adjudged an insolvent, save and except that of an execution against him where the attached property has been released by giving a redelivery bond; and in such case the allegation that more than one month after the attachment was made the debtor was adjudged insolvent, would relieve the plaintiff from alleging that an execution had been issued and returned unsatisfied. In this case the sureties on the bond, not being liable thereon, could not prove a claim against the insolvent under section 41 of the act, as supposed by respondent. The questions in this case must be determined under our own statutes and decisions, and it is therefore not necessary to

review the cases cited from other jurisdictions. As the complaint cannot be amended so as to state a cause of action, the judgment and order appealed from should be reversed, with directions to dismiss the action.

We concur: Chipman, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with directions to dismiss the action.

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## ABBOTT v. '76 LAND & WATER CO.

Sac. No. 310; May 31, 1898.

53 Pac. 445.

**Option—Necessity of Notice of Acceptance.—There is No Contract** authorizing action for damages by one given option to buy within certain time, where he does not give notice of acceptance of offer, though the offer is withdrawn before expiration of the time.

APPEAL from Superior Court, Tulare County.

Action by M. O. Abbott, substituted for Joseph Marriott, against the '76 Land & Water Company. Judgment for defendant. Plaintiff appeals. Affirmed.

O. L. Abbott for appellant; Daggett & Adams for respondent.

HAYNES, C.—A demurrer to plaintiff's second amended complaint was sustained without leave to amend, and judgment of dismissal was entered, and the plaintiff appeals.

The complaint is very long, but for the purposes of this opinion the facts alleged may be stated as follows: The defendant is a corporation owning large quantities of land and certain water rights, canals and ditches, by means of which much of its lands, including the six hundred and forty acre tract in controversy, may be irrigated. For several years prior to October 1, 1886, the defendant leased portions of the lands to different persons under cropping contracts, and these contracts contained a clause giving the cropper the right

to purchase the land described in the contract, for a price and upon terms therein stated, at any time before the expiration of the lease. The price fixed in these contracts included a water right of forty inches of water for each forty acres. The defendant also advertised that it would let its lands upon these terms, and also had adopted a resolution to that effect. Joseph Marriott had occupied the land here in question for several years prior to October 1, 1886, under leases or contracts containing the option to purchase above stated; but the lease for the year commencing October 1, 1886, did not contain such option. In May, 1887, the land commenced to increase in value, and by October 1st its value had about doubled. In July, 1887, the defendant announced that it withdrew all its lands from sale under these options. It is further alleged that about September 25, 1897, Marriott elected to purchase the land in question, claiming that under the usages and resolutions of defendant he had the right to purchase, but did not notify or inform the defendant of his election, nor tender or offer to pay the purchase money, but would have done so if he had not believed the statements of defendant withdrawing its land from sale; that he was not aware that his right to purchase could be enforced notwithstanding the withdrawal until a few weeks before this suit was commenced; that he was always able, ready and willing to pay, and now offers to pay, the sum at which said land was scheduled, viz., $17,800; that in July, 1890, defendant sold the water right incident to said land for $64,000, and has had said money on interest at six per cent per annum; that because of said representations he surrendered possession of the land, the annual rents and profits of which were $1,600. The prayer is that defendant be required to convey the land, that it be charged with the $64,000 received for the water right, and interest thereon, and with the rents and profits, from all which he offers to deduct the price of the land, and accept a judgment for "a balance of trust fund amounting to $80,220." The present plaintiff, having succeeded in some way to Marriott's rights, was substituted as plaintiff.

Placing the most favorable construction possible upon the complaint, and assuming that the previous usages, customs and resolutions of the defendants are to be considered as incorporated in Marriott's lease made in October, 1886, and

assuming further that defendant could not take away his right of purchase by its withdrawal of the option and announced determination not to sell or convey, still there was no contract of sale created between the parties. The acceptance of the offer must be communicated to the party making the offer, or there is no contract. The withdrawal of the option, or the announcement that it would not sell or convey the property, could not relieve Marriott from the necessity of communicating his acceptance of the offer, though it might possibly obviate the necessity of a tender of the purchase money, or an offer to pay it, if he had taken the necessary step to create a contract by notifying the defendant, before the expiration of the lease, of his acceptance of the offer. The allegations of the complaint in this regard amount simply to this: that Marriott mentally concluded that, if the defendant had not refused to sell, he would buy; that for seven or eight years he acquiesced and gave no voice to his desire to purchase, when he was advised that he could have compelled the defendant to sell and convey, and still could do so with the added advantage of being relieved from any payment on account of the purchase, and of recovering $80,220 with which to start business on the ranch. The most remarkable feature of the case is that he should have been so advised. The demurrer was properly sustained without leave to amend, and the judgment of dismissal should be affirmed.

We concur: Searls, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## TODHUNTER et al. v. ARMSTRONG.

Sac. No. 316; May 31, 1898.

53 Pac. 446.

**Master and Servant.—One Who Takes Charge of Another's Ranch,** with the understanding that he is to receive for his services a certain sum per month, and, after paying from the gross proceeds the operating expenses, including his own salary, and deducting what was due for supplies and equipments furnished by him, to return the balance to the owner, and who does not agree to bear a part of any

loss which may occur, is merely a hired man, and not a tenant. A verbal understanding that he was to remain in possession of the property, and have a lien thereon till he was paid, is no defense to the owner's action for recovery of possession.

APPEAL from Superior Court, Glenn County.

Action by George F. Todhunter and others against W. S. Armstrong. From a judgment for plaintiffs and an order denying a new trial defendant appeals. Affirmed.

J. C. Ball for appellant; S. Millington, R. E. Hopkins and Hiram W. Johnson for respondents.

BELCHER, C.—Plaintiffs commenced this action in January, 1896, to recover possession of a tract of land in Glenn county, called the "Willows Rancho," alleging that they were the owners of the said land in fee, and entitled to the possession thereof, and that defendant in September, 1895, entered into and took possession of the said land without any right thereto, and without the consent of plaintiffs, and had wrongfully withheld the possession thereof from the plaintiffs. Defendant answered, and filed a lengthy cross-complaint, in which he set up facts which it is claimed entitled him to retain possession of the said property. The following facts, among others, are alleged in the cross-complaint: Long before February 1891, and up to the time of his death, in January, 1893, W. B. Todhunter, the father of plaintiffs, was the owner of the land described in the complaint, and other lands situate in Yolo and Sacramento counties, and also a large amount of personal property. He had employed defendant for many years, and there existed between them great confidence and trust. He resided in Yolo county, and in February, 1891, entered into an agreement with defendant, by which it was mutually agreed that defendant should remove to and take full charge of the said Willows rancho. He was to take with him certain horses, harness, wagons and farming implements, of the value of $535, which he then owned, and was to use the same, together with such implements and teams as Todhunter should furnish, in the cultivation and improvement of said land; to employ all necessary help, and furnish board for the men employed; to purchase such machinery and articles as might be needed, from time to time, on the rancho; and to sell the surplus produce, and

out of the proceeds defray expenses, and upon final settlement turn over the residue to Todhunter or his heirs. For his services and the use of his said property defendant was to retain out of the proceeds of the sales for himself $50 per month, and fifty cents a day for the board of each person employed on the ranch and boarded by him, and upon final settlement was to be paid $535, the value of the property furnished by him, and a small sum due from Todhunter to him at the time the agreement was made. No time was fixed when said venture should terminate, but it was understood and mutually agreed that defendant was to remain in possession of said property and have a lien thereon until he was settled with and paid. Under this agreement the defendant, on February 20, 1891, took possession of the said property, and continued in possession thereof until Todhunter died; and after his death the agreement was maintained by his heirs and representatives until this suit was brought. Both Todhunter and defendant performed all the conditions of the said agreement to be by them respectively performed, but no complete accounting or settlement was had between them prior to his death, or has since been had between the representatives of his estate and defendant. In September, 1893, the plaintiff George T. Todhunter was duly appointed by the superior court of Yolo county administrator with the will annexed of his father's estate; and in June, 1894, as such administrator, he filed in court an account of his administration, to which he attached a statement of the account of the defendant, theretofore rendered to him for allowance and payment, and asked to have the same heard and considered by the court in connection with his said account. Thereafter the matter came on regularly for trial before the court, and was submitted for decision, and "the court duly made and filed its decision, whereby there was found to be due and owing from the estate to the said Armstrong the sum of $1,732 for transactions had under said agreement between" certain dates named, and no part of this sum had been paid. In September, 1895, George F. Todhunter, as such administrator, procured and induced the court to make and enter of record its decree and judgment, distributing the estate of said decedent to his heirs and devisees, and discharging said administrator. The distribution was made in accordance with a written agreement made and entered into by all the

heirs entitled to share in the estate, and upon the representation that there were still outstanding claims against the estate, but that all the claimants consented that a decree be entered distributing the estate in the manner provided in said agreement. The creditors of the estate, and particularly this defendant, did not in fact consent that any decree of distribution be then entered, and the representation that they did so was false, and made for the purpose of defrauding them and preventing the collection of their claims against the estate. By the decree there was distributed to the plaintiffs herein the land here in controversy, together with a large amount of other real and personal property, and it was expressly provided that all the indebtedness of the estate, except a certain mortgage on lands in Yolo county, should be assumed and paid by them. The prayer was that the plaintiffs take nothing by the action, and that defendant have judgment against them for the sums alleged to be due him, and that he have a lien, coupled with possession, on the land described in the complaint for the payment of such judgment. The plaintiffs answered the cross-complaint, denying most of its material averments.

The case was tried by the court without a jury, and the findings and judgment were in favor of the plaintiffs. From that judgment and an order denying a new trial defendant appeals.

At the trial the plaintiffs introduced in evidence the said decree of distribution, and proved that fifteen days before the action was commenced they served on defendant a written demand for the possession of the said premises. The defendant was then called as a witness in his own behalf, and testified that since the twentieth day of February, 1891, he had continuously resided on the land in suit; had cultivated and improved the property, raised, harvested and disposed of the crops each year, and such parts of the crops as were not used on the ranch, for the ranch, had been sold and accounted for; that he had full control of the property, and paid the taxes and accounted for everything raised thereon; and that he went upon the property, and took the control and management thereof, under and by virtue of an agreement made with W. B. Todhunter. He was then asked to state fully what that agreement was. Plaintiffs objected to the question, and to the admission of any evidence as to the

terms of the contract under which defendant claimed the right to hold possession, unless the contract was in writing; and the objection was sustained.

There is no pretense that the agreement sought to be proved was in writing; and, as pleadings are construed most strongly against the pleader, it must be assumed that the terms of the agreement, as set out in the cross-complaint, are as favorable to defendant as the facts would justify.

It is claimed for appellant that by the agreement the relation of landlord and tenant was created between the parties; that appellant became a tenant at will, and as such was occupying and holding the property when this suit was brought; that his tenancy could only be terminated by a written notice given by the landlord, to remove from the premises within a period of not less than one month, to be specified in the notice; and hence that this action could not be maintained, no such notice having been given: Civ. Code, secs. 789, 790; Code Civ. Proc., secs. 1161, 1162. Whether appellant was a tenant of the property or not is the controlling question in the case; for, if he was not a tenant, but only a general manager or superintendent, then the rulings of the court below on the admission of evidence, and the findings of the court based upon the evidence admitted, were all justified and proper. We fail to see how the agreement set out can be said to have created any relation of landlord and tenant between the contracting parties. It is true appellant was to, and did, have the full control and management of the farm, but for his services in so doing he was to receive only a salary of $50 per month. After paying from the gross products of the place the expenses of operating it, he was to receive no part of the residuum, and was to bear no part of the loss, if any loss should occur. In short, he was, in our opinion, simply a laborer or hired man, and was subject to be discharged at any time. Numerous authorities are cited by appellant relating to tenancy and partnership, but, as no tenancy or partnership is shown to have existed, they are not in point, and need not be specially noticed.

Some stress is laid on the words, "It was understood and mutually agreed that defendant was to remain in possession of said property and have a lien thereon until he was settled with and paid." But such an oral agreement would not

create a lien, and, if it did, would not constitute a defense to an action brought to recover possession of the property.

After a careful consideration of the case, we conclude that there is no valid ground for a reversal, and that whatever right appellant may have to recover the amount alleged to be due him must be asserted against respondents under the condition attached to the decree of distribution, that they should assume and pay all outstanding and unsecured debts of the estate. We advise that the judgment and order appealed from be affirmed.

We concur: Haynes, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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## COLUSA COUNTY v. SEUBE.

Sac. No. 274; May 31, 1898.

53 Pac. 654.

**Intoxicating Liquors.—The Taxing Clause of a County Ordinance** provided that every person who should sell intoxicating liquors in quantities less than one quart should obtain a license, and pay therefor $100 per year. Held, that since this clause did not impose a license for carrying on the business of selling liquor, as authorized by Statutes of 1893, page 358, but imposed it for the simple act of selling, and applied to each sale before it was made, it could not be changed by implication from the wording of other sections of the ordinance, which suggested an intention to tax the business itself.

APPEAL from Superior Court, Colusa County.

Action by Colusa county against B. Seube. Judgment for plaintiff and defendant appeals. Reversed.

W. G. Dyas and B. F. Howard for appellant; Ernest Weyand for respondent.

CHIPMAN, C.—Action to recover a license tax for carrying on "the business of selling liquors at retail, in quantities less than one quart, at a saloon in Colusa county." Plaintiff had judgment, from which defendant appeals. It was

stipulated as fact "that the defendant did, from the fifth day of November, 1895, to the —— day of December, 1895, carry on a business of selling liquors at retail, and did sell spirituous . . . . liquors, in quantities of less than one quart, . . . . as in said complaint alleged." Section 4 of the ordinance, under which the action is brought, reads: "Every person who sells spirituous, malt or fermented liquors or wines, in quantities less than one quart, must obtain a license and pay therefor one hundred dollars per year." Section 14 of the ordinance provided as follows: "Against any person required to take out a license, who fails or refuses to take out such a license, or who carries on business without such license, suit may be brought . . . . for the recovery of said license tax," etc. This ordinance was enacted by authority of subdivision 27 of section 25 of the county government act of 1893 (Stats. 1893, p. 358), which gives to boards of supervisors power "to license, for purposes of regulation and revenue, all and every kinds of business not prohibited by law," etc.; "to fix the rates of license tax upon the same." A similar ordinance was the subject of construction in Merced Co. v. Helm, 102 Cal. 159, 36 Pac. 399, and so also was the extent of the authority given by the county government act of 1891 (the same as that of 1893) to pass the ordinance clearly defined. It was held in that case that the right to impose a tax upon a "business" will not authorize imposing a tax upon the individual acts connected with such business; and that a license tax required for one business cannot be demanded for any act or business not specified in the ordinance providing for such taxes. The distinction between a single act (such as selling liquors), and the business in which the act is done (such as being engaged in the business of selling liquor) was pointed out, and the adjudged cases cited; and it was clearly shown that the ordinance did not purport to impose a tax for carrying on the business, but was for the sale, and applied to each sale before it was made, fixing a liability for the full amount of the tax for a single sale.

There is no brief on file for the respondent, and we have no intimation as to what its reply is to the claim of appellant based upon the Merced County case, supra, except as it is found in the opinion of the learned trial judge, which appears in the transcript, given on overruling appellant's demurrer.

It is there conceded that the Merced county case is decisive of this case, unless we can resort to other sections of the ordinance to ascertain the meaning of section 4, supra. But it was said in the Merced County case referred to: "The other portions of the ordinance providing a procedure for the collection of the tax cannot be invoked to change the terms of the tax, as the tax itself is only that which is fixed in the twelfth [here the fourth] section." Section 8 of the ordinance requires that "no license shall be issued for the sale of liquors . . . . until the applicant shall have presented to and filed with the board . . . . a bond . . . . conditioned that the said applicant shall conduct the business in a quiet and orderly manner"; further, "that no license shall be issued to any person . . . . to transact business . . . . under section 4 until they have first filed a petition signed by not less than five freeholders, asking that a license be issued to the applicant, and shall state the place at which said business is to be carried on." Other sections of like import are cited. It was the presence of these provisions in other portions of the ordinance which led the trial judge to conclude that "it is quite plain that it is the business, as contradistinguished from the simple act of selling, for which the license is required." If this conclusion might be held correct as to an ordinance in its nature remedial, it is not correct here where the ordinance is "to be construed strictly in favor of the individual as against the state," as was held to be the rule in the Merced county case. It was said in that case that "no presumption is to be indulged in favor of the right to take the property, or of any intention that is not distinctly so expressed in the statute under which it is sought to be taken." Again: "A tax can never be extended by construction to things not named or described in the statute as the subject of taxation." Quoting from Lord Cairns in Partington v. Attorney General, L. R. 4 H. L. 125, it is further said: "If there be admissible in any statute what is called an equitable 'construction,' certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." We do not think the taxing section of the ordinance can be aided by resort to other of its sections which do no more than, by implication, to suggest that an intention to tax the business of selling liquor, and not the selling merely, was in the minds of the board. We think the reasoning in the Merced County

case is conclusive of this case, and therefore advise that the judgment be reversed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed.

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## BRYSON v. McCONE et al.

L. A. No. 258; June 4, 1898.

53 Pac. 639.

**Appeal—Review.—Where Appellant Insists That, on the Findings** of the lower court, he is entitled to a more favorable judgment, but waives all right to have the case remanded for a new trial, the court will rely entirely on the findings whether or not the evidence supports them.

**Damages.—The Appellate Tribunal will not Go Beyond the strict** rules of law to increase plaintiff's allowance of damages for loss of profits.

APPEAL from Superior Court, Los Angeles County.

Action by I. H. Bryson against A. J. McCone and others for damages from a breach of contract. From a judgment for plaintiff, he appeals. Affirmed.

W. P. Gardiner, J. S. Chapman and R. L. Garrett for appellant; Knight & Heggerty and Ben Goodrich for respondents.

TEMPLE, J.—This is plaintiff's appeal from the judgment. Defendants also appealed from the judgment, and from a refusal of a new trial: L. A. No. 279, 121 Cal. 153, 53 Pac. 637. In that case the facts are stated more at large, and many of the points also involved in this appeal are discussed.

Plaintiff insists that, upon the findings, he is entitled to a more favorable judgment. He has, however, greatly discredited his contention by bringing up in a bill of exceptions all the evidence respecting the relations between plaintiff and

defendants subsequent to March 1, 1892, and regarding any extension of time for completing the contract, and any waiver of damages, and also in regard to the cost of producing ice, and the expenditure of $1,800 for water-power, and $243.19 for ammonia. If the contention is only that appellant is entitled to a different judgment upon the findings, there can be no use for a bill of exceptions to bring up the evidence. And yet appellant's brief refers indifferently to the facts found and what the evidence shows. I presume counsel realize that the findings must be supplemented upon the points with reference to which they have brought up the evidence. Still, appellant states in his points that he does not desire a new trial; and, if he cannot obtain relief by a simple modification of the judgment, he prefers to waive, and does waive, his claim to additional damages. The court found that plaintiff could have made profits by the manufacture and sale of ice to the amount of $1,166.66⅔ per month if said machinery had been perfected with the capacity of fifteen tons per day, of such ice as was described in the contract, from the first day of March, 1892, up to the first day of October, 1892; and for the last three months of that period he was damaged to that extent for each month by the failure to complete the machinery according to the contract. It is also found, in effect, that plaintiff gave defendants until the 2d of July, 1892, to perform the contract. It may be true that the evidence shows without conflict that the time for the completion of the contract was not extended, but that plaintiff all the time insisted that defendants had violated their contract, and were liable to him for damages. We cannot supply the defects in the findings, but if facts exist which are not found, and which are material, the error could only be corrected by a new trial.

Formerly, as I understand the history of the proposition of law involved, this claim of damages would have been rejected as speculative. It is only found that plaintiff could have made such profits, not that he would have made them, or that it was reasonably certain that such profits would have been made. It is a harsh rule which allows plaintiff to recover such damages, although I think it is now settled that damages which are reasonably certain to accrue may be recovered. Had this machinery been perfect, yet for some fault of the plaintiff, or through accident, he may not have been able to realize profits. Had what was not been, no one could tell

what would have occurred. Under such circumstances, we are not inclined to go beyond the strict rules of law to increase the plaintiff's allowance of damages. He who can recover upon a theory relieved from all hazards has a great advantage. As to the cost of the water and ammonia which was lost to plaintiff by the failure to complete the machinery by the 1st of March, 1892, the same argument will apply. Possibly, however, some proportion of this should be allowed to the plaintiff as damages, irrespective of any question as to the extension of the time for the completion of the contract, if the proper proportion could be determined from the findings. Again, however, it seems to have been found that the only damage which plaintiff has suffered, for which he is entitled to a judgment, is the sum of the various items which were allowed. These conclusions are reached upon the supposition that appellant waives his right to a new trial. In that view, of course, the evidence brought up has not been regarded. The judgment is affirmed.

We concur: Henshaw, J.; McFarland, J.

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## TUSTIN FRUIT ASSOCIATION v. EARL FRUIT CO.

L. A. No. 330; June 27, 1898.

53 Pac. 693.

**Agency—When Agent may Sue in Own Name.**—Where an agent contracts directly as a principal, he may sue on the contract in his own name, regardless of whether the other party knew of his agency.

**Factors.—Plaintiff Sued on a Contract by Which Defendant** agreed to sell plaintiff's fruit, and guarantee sales, alleging that plaintiff "sold and delivered" at a certain place a stated amount of fruit, which was picked, packed and loaded "by plaintiff under the inspection and approval of the defendant, and was received, accepted, and receipted for by defendant at the prices mutually agreed upon by plaintiff and defendant for said fruit," and setting forth the amount unpaid from defendant to plaintiff for said fruit. Held, that the allegation, taken in connection with the contract, showed a sale by defendant, as a factor, for plaintiff, for which it was liable under its contract of guaranty.

**Factors.—A Fruit Company Agreed With an Association** not to handle the fruit of those who were not members of the association,

without its consent. The association, in an action against the company, alleged that under that provision in the contract the company had agreed to pay plaintiff a certain price for each box belonging to a certain fruit-raiser, stating the number thereof; that defendant had begun to buy or ship the same; and that plaintiff was entitled to recover of defendant, "by reason of the agreement relating to the handling" of said fruit, a stated amount. Held, that the allegation was sufficient against a general demurrer, though it was not alleged that such fruit-raiser was not a member of the association, or that defendant in fact "handled" his crop.

**Corporation—Proof of Incorporation.—Where the Contract Sued on Describes** plaintiff as a corporation, no further proof of its incorporation is necessary.

**Association.—An Agreement by the Stockholders of an Association** which recited that, "being desirous of having my oranges handled in the manner set forth in the by-laws" of the association, they individually appointed the association their agent, may be introduced in evidence, without the by-laws referred to, in an action by the association on a contract between it and a fruit company for the sale of fruit.

**Association—By-laws as Evidence.—Under Code of Civil Procedure,** section 1854, providing that "when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence," defendant may introduce plaintiff's by-laws, where plaintiff introduced an agreement between its stockholders and plaintiff which stated that, "being desirous of having my oranges handled in the manner set forth in the by-laws" of plaintiff, they individually appointed plaintiff their agent.

**Factors.—Under Civil Code, Section 2029,** providing that "a factor who charges his principal with a guaranty commission upon a sale, thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own," and section 1794, providing that the obligation of a factor who undertakes, for a commission, to sell merchandise and guarantee the sale is original, and need not be in writing, a factor selling under a guaranty of sales becomes liable absolutely for the price, and a finding that it was the purchaser is immaterial error.

**Factors.—An Association Contracted With a Fruit Company** to deliver No. 1 fruit f. o. b., and the company was to guarantee the sale. The association also agreed to deliver to the company No. 2 fruit, f. o. b., the sale of which the company did not guarantee. The fruit was picked, graded, culled and packed under the supervision of the company's agent, who receipted for it as "Sold f. o. b."; and the company's president testified that, at the time of shipment, account sales were rendered the association by the company on the assumption that the fruit was No. 1 except where otherwise stated. Held, that a

certain consignment, not shown to be within the exception, was accepted by the company as No. 1 fruit.

**Factors.—A Fruit Company Contracted With an Association** to take from it No. 1 fruit, "guaranteeing original sales and collections; it being understood that all responsibility" of the association "ceases when said fruit is accepted" by the company on board cars. Held, that the company, having accepted fruit as No. 1 without any representations of the association touching its quality, was bound to account for that quality of fruit, although, through a latent defect, the fruit proved to be inferior.

**Sales.—Where a Buyer Refuses to Accept Perishable** property under a contract, it is the right of the seller to sell it forthwith, so as to reduce his damages.

**Sales—Damages Where Buyer Refuses to Take Fruit.**—Civil Code, section 3353, provides that in estimating damages the value of property to a seller is the price which he could have obtained in the market nearest to the place where the buyer should have accepted it, as soon after the breach of the contract as the buyer could, with reasonable diligence, have effected a resale. Held, that the value to a seller of fruit which a buyer refused to take is its value in the condition it was in when the owner could have sold it after the repudiation of the contract.[1]

APPEAL from Superior Court, Orange County.

Action by the Tustin Fruit Association against the Earl Fruit Company. From a judgment giving plaintiff partial relief and from orders denying a new trial both parties appeal. Affirmed.

Victor Montgomery and J. D. Pope for plaintiff; M. L. Graff, Guy C. Earl and J. G. Scarborough for defendant.

BRITT, C.—There are cross-appeals in this case. The plaintiff's action is founded on a written contract executed by and between the parties now litigant, of which the more material portions are as follows:

"This agreement, made and entered into at Tustin this eighteenth day of December, 1894, in duplicate, by and

[1] Cited in Piowaty v. Sheldon, 167 Mich. 227, 132 N. W. 520, where, in a case somewhat similar, the court says: "We are unable to agree with counsel for the plaintiff that the defendant was not entitled to charge the plaintiff with the expenses in connection with the storage and insurance of the apples in question, if entitled to recover at all," and denies there being anything in the cited case counter to this proposition.

between the Tustin Fruit Association, a corporation, of Tustin, Orange county, California, party of the first part, and the Earl Fruit Company, a corporation, of Los Angeles, California, party of the second part, witnesseth: That the party of the first part hereby places all oranges under its control, or that may come under its control during the season of 1894–95, in the hands of the party of the second part, to market for their [its] account, on the terms and conditions hereinafter stated. Party of the second part to sell all No. 1 fruit of regular sizes, together with as many off sizes as are included in the standard car, as established by the Southern California fruit exchanges, f. o. b. Tustin, guaranteeing original sales and collections; it being understood that all responsibility of the party of the first part ceases when said fruit is accepted by the party of the second part on board cars at Tustin. Party of the second part to make best disposition possible of No. 2 fruit, and any accumulation of off sizes, on which it is understood no guaranty is made. The party of the first part agreeing to allow party of the second part a commission of twelve and one-half per cent of the gross price for which the fruit is sold, f. o. b. Party of the second part to make cash payment for all guaranteed sales as fast as such shipments are made, or not later than the week after shipment, and cash settlement for all other sales as fast as account sales are rendered. Selling prices are to be mutually agreed upon Wednesday of each week, which prices will rule for the following week; it being understood and agreed that such selling price shall at no time exceed the prices which the Southern California fruit exchanges are selling equal grades of fruit during the same period. It is further understood and agreed that all orders taken, to not exceed twelve cars per week after March 13th, or more if accepted by the party of the first part, shall be protected and filled by the party of the first part. The party of the second part to furnish orders for at least (average) twelve carloads per week, when requested by party of the first part, after March 15th. Party of the second part to dispose of all seedlings and navels, hereby contracted, on or before May 15, 1895, and all other varieties of oranges on or before July 1, 1895, unless otherwise mutually agreed. Picking, grading, culling and packing of fruit and loading of cars to be done by the party of the first part, and subject to the approval and inspection of the party of the second part.

Party of the first part to pick and grade the fruit into grades substantially equivalent to the grades as determined and established by the Southern California fruit exchanges. Choice and standard grades of fruit, more particularly described, are as follows: Choice grade is to be bright, clean, juicy, and free from smut, scale, frost and culls. 'Standard' grade, it is understood, will be somewhat smutty and scaly, but juicy and free from frost and culls. Party of the second part further agrees not to handle the oranges of any grower of Tustin or Santa Ana who is not a member of the Tustin Fruit Association, except with the consent of the party of the first part."

In its complaint the plaintiff charged several breaches: First, that defendant failed to pay a balance of $4,059.78 due for thirteen carloads of oranges received by it between March 3, and March 15, 1895; second, that defendant refused to accept twelve carloads of oranges at prices agreed on by the parties for the week following March 13, 1895, to plaintiff's damage in the sum of $4,600; third, that defendant similarly refused to accept twelve carloads of oranges for the week following March 20, 1895, to plaintiff's damage in the sum of $4,600; fourth, that after said March 20th defendant refused to agree with plaintiff on the prices of oranges, or to receive any fruit, or to furnish any order therefor, to plaintiff's damage in the sum of $25,000; and, fifth, that defendant handled the crop of oranges belonging to one Wall, within the prohibition of the last clause of said contract, and failed to pay plaintiff for consent given thereto as it (defendant) had promised. A demurrer to the complaint interposed by defendant was overruled.

By its answer the defendant admitted the execution of the contract alleged, but denied most of the other allegations of the complaint. It also pleaded, at considerable length, several counterclaims: Firstly, that defendant, as agent of plaintiff, after the execution of said contract sold to various of its (defendant's) customers in the eastern market fifty-eight carloads of oranges as No. 1 fruit; that the same proved to be not No. 1 fruit, in that it developed a lack of good shipping and carrying qualities, and so arrived at the several places of destination of the cars at the east in bad condition, and that defendant sustained a loss of $3,110.54, in the excess of advances it made to plaintiff thereon above the sum realized for the fruit. The second counterclaim was founded on the

same transactions as those described in the first, and claimed general damages in the sum of $50,000. Some particulars of the pleading will be stated when we come to consider the demurrer thereto, which was sustained by the court. As the ground of the third counterclaim, defendant set up a contract between the parties of date March 9, 1894, for marketing the oranges of plaintiff for the reason then current. Such contract was quite similar in its main features to that of December 18, 1894, on which plaintiff sues. The classification of fruit in the earlier contract, however, was as choice and standard only; and defendant averred that thereunder it received and handled for plaintiff between March 10, 1894, and July 13, 1894, one hundred and forty-seven carloads of oranges, believing the same to be choice, as defined in that contract; and, for reasons similar to those alleged in said first counterclaim—the fruit proving to not be choice, and arriving in bad order in the eastern market—defendant alleged that it sustained a loss, in its advances of purchase price to plaintiff above returns from the fruit, amounting to $12,500.53. The fourth counterclaim, to which the court sustained a demurrer, bore a like relation to the foregoing third counterclaim that the second bore to the first, and alleged damage in the sum of $50,000 for detriment incidental to defendant's performance of the said contract of March 9, 1894. The fifth counterclaim was for a balance of $1,002.26 for goods, etc., sold by defendant to plaintiff about March 18, 1895.

After trial, the court made findings from which it concluded that defendant is liable to plaintiff in the sum of $4,059.78 for thirteen carloads of oranges received by defendant under the contract of December 18, 1894, as alleged in the complaint (defendant's commissions, and a credit allowed by plaintiff for the value of the merchandise mentioned in the fifth counterclaim, having been first deducted); that defendant is further liable to plaintiff in the sum of $77 on account of oranges handled by defendant for said Wall; that for the several failures of defendant to receive oranges from plaintiff after March 15, 1895, pursuant to the contract of December 18, 1894, defendant is liable in nominal damages only, fixed at three dollars; and that defendant should take nothing by reason of its counterclaims. Judgment was entered accordingly. Each party moved for a new trial, and their

respective motions were denied. We shall consider first the appeal of the defendant.

1. It is contended that plaintiff is not the real party interested in the relief it demands, and for that reason ought not to be permitted to maintain the action. This objection is taken on certain allegations of the complaint which, it is claimed, show that plaintiff was not the owner of the oranges that were the subject of the contract of December 18, 1894; that the stockholders of plaintiff, in their respective individual capacities, owned the various crops of oranges making up the aggregate with which plaintiff assumed to deal; and that plaintiff was merely their agent to market the same. Admitting that all these things appear from the complaint, it is yet not perceived why plaintiff may not sue. The defendant contracted directly with plaintiff as a principal, and in such a case the law allows the agent treated as a principal to sue in his own name on the contract, whether the fact of agency was or was not known to the other contracting party: 1 Chit. Pl. 8; Pom. Code Rem., secs. 141, 177; Mechem, Ag., sec. 755; Phillips v. Henshaw, 5 Cal. 509; Du Bois v. Perkins, 21 Or. 189, 27 Pac. 1044. It was averred in the complaint that plaintiff "sold and delivered on board cars at Tustin thirteen carloads of No. 1 fruit, . . . . all of which fruit was picked, graded, culled, packed and loaded on said cars by plaintiff under the inspection and approval of the defendant, and was received, accepted and receipted for by defendant at the prices mutually agreed upon by plaintiff and defendant for said fruit"; that at such prices, less defendant's commissions, the amount unpaid from defendant to plaintiff for said thirteen carloads is the sum of $4,059.78, etc. It is objected that these allegations are defective, in that, while alleging a sale by plaintiff, they do not show a purchase by defendant; that the contract provides that defendant shall sell the fruit, guaranteeing sales thereof; and that to aver that plaintiff sold the goods was to allege a violation of the contract by plaintiff. The criticism is not well founded. Understood in connection with the provisions of the contract, the averment showed a sale made through the instrumentality of defendant, as factor for the plaintiff, under such conditions that defendant's liability for the price, less its commissions, had attached pursuant to its contract of guaranty. So understood, it was not incorrect to say that plaintiff sold the goods.

Respecting Wall's crop of oranges, plaintiff alleged, in substance, that in virtue of the last clause of the contract the defendant agreed to pay plaintiff, in consideration of its consent, five cents for each box of Wall's crop—stated at ten thousand boxes—that defendant bought or shipped; that defendant "has commenced to buy or ship the same for said Wall, and that plaintiff is entitled to have and recover of and from the defendant, by reason of the agreement relating to the handling of said Wall's crop of oranges, the sum of five hundred dollars"; also, that defendant committed a breach of its contract, in not settling with plaintiff for the oranges shipped from the orchard of Wall at the rate of five cents per box. To these averments of the complaint defendant objects, mainly, that they fail to show that Wall was not a member of the Tustin Fruit Association, and also fail to show that defendant has in fact "handled" his crop. The allegations under view lack the precision which should characterize good pleading, but they show that defendant shipped—and thus handled—some of Wall's oranges, and that for plaintiff's consent to this proceeding defendant promised, "in virtue of the last clause of said contract," to pay a stated sum. It is to be inferred, therefore, that Wall was not a member of the plaintiff's association, for it was crops of outsiders only that defendant was forbidden to handle without plaintiff's consent. Hence the statement of a cause of action as to Wall's oranges must be held sufficient against a general demurrer, which is the only form taken by defendant's objections in the record: Amestoy v. Transit Co., 95 Cal. 311, 30 Pac. 550; Alexander v. McDow, 108 Cal. 29, 41 Pac. 24.

2. The court found that plaintiff is a corporation, and defendant claims that there was no evidence to sustain the finding. The contract between the parties described the plaintiff as a corporation, and no further proof on that point was necessary: Fresno Canal & Irr. Co. v. Warner, 72 Cal. 379, 14 Pac. 37.

It is urged that there was no evidence to support a certain finding of the court to the effect that prior to the contract of December 18, 1894, the stockholders of plaintiff, for the purpose of marketing their several crops of oranges, sold and conveyed to plaintiff, in trust for themselves, their, and each of their, entire crops, etc. We see no materiality in the finding, in view of other facts found or admitted. It sufficiently

appears that plaintiff had control of the oranges concerning which it contracted for the purpose of marketing the same. If the stockholders were making demands on defendant similar to those on which plaintiff sues, there might be ground for inquiring into their relations with plaintiff; but this is not shown, and defendant has no concern in the nature of the plaintiff's title to the fruit—whether it was that of full legal ownership, or the qualified interest of an agent. Upon this point, see the authorities above cited on the question of plaintiff's right to maintain the action; also, Lumley v. Corbett, 18 Cal. 494; Groover v. Warfield, 50 Ga. 644.

Here may be noticed the objection to the admission in evidence of the written agreement signed by plaintiff's stockholders, and entitled, "Contract for Marketing Oranges." Such instrument contained the following preface: "Being desirous of having my oranges handled in the manner set forth in the by-laws of the Tustin Fruit Association, [I] do for such purpose hereby constitute and appoint the Tustin Fruit Association, a corporation, my sole agent," etc. This introduction was followed by other matter showing the purpose of the individuals signing the document that plaintiff should market their oranges, and pay to them, pro rata, the net proceeds of sales thereof. The special objection urged is that the document was not accompanied by the by-laws to which it referred. Assuming (what is by no means clear to us) that the instrument was any essential part of plaintiff's proofs, we yet think the objection was not well taken. We agree that no part of a document should be wrenched from its context, and received as a disjointed member of what is properly an indivisible unit of evidence. But here the paper offered by plaintiff was no such fragment. It seemed to be complete in itself, so far as regards authority to sell the subscribers' fruit, and contained no intimation that the by-laws varied, or might vary, its import; for, in terms, it purported to conform to the by-laws. The effect of the reference to the by-laws was to make them admissible, had defendant chosen to offer the same, but not to render them the inseparable accessory of the paper containing the reference: Code Civ. Proc., sec. 1854; Toohey v. Harding, 1 Fed. 174, 177, 4 Hughes, 253; note to Rouse v. Whited, 82 Am. Dec. 345, and cases cited.

The court found that between March 3 and March 15, 1895, "plaintiff sold and delivered to defendant, on board cars, thirteen carloads of No. 1 fruit; the same being oranges," etc. The finding of a sale from plaintiff to defendant (if such is the proper import of this language) was both outside the issues made by the pleadings, and contrary to the evidence, but it does not follow that the judgment should fall. It appeared clearly enough from the findings that plaintiff sold and defendant received the goods pursuant to the guaranty of sales in the contract of December 18, 1894. Defendant was therefore liable absolutely for the price when it became due, and the finding that it was in fact the purchaser is of no consequence: Civ. Code, secs. 2029, 2794, subd. 4; Mechem, Ag., sec. 1014.

It is strongly insisted that the finding to the effect that said thirteen carloads of oranges consisted of No. 1 fruit is without support in the evidence. There was evidence that all the fruit received by defendant under the contract, including said thirteen carloads, was picked, graded, culled and packed under the direct supervision of defendant's agent, as allowed by the terms of the contract. It was in testimony that such agent went into the orchards, and selected the fruit to be picked. He decided what fruit should be accepted by defendant, and what rejected, and when the cars were packed he receipted for them. As to each of the said thirteen cars his receipt showed that the fruit was "Sold, f. o. b." Now, we agree with defendant that to admit a sale of fruit, f. o. b., did not necessarily admit it to be No. 1 fruit; for although the No. 1 fruit was by the terms of the contract to be sold f. o. b., and thereupon fell within the scope of defendant's guaranty, yet No. 2 fruit, sales of which were not within the guaranty, might also be sold f. o. b.; but a sale f. o. b. was evidently a sale for shipment, and the defendant's president testified that "the general course of business was that, at the time of shipment of all these various cars of fruit, account sales were rendered by defendant to plaintiff upon the assumption that the oranges were No. 1 fruit, and of good keeping quality, except where especially otherwise stated," etc. None of said thirteen carloads were shown to have been within the exception mentioned by the president. Considering his statement in connection with the evidence of the supervision exercised by defendant in the matter of grading

and culling the fruit, it is plain that defendant accepted the said cars of oranges as No. 1 fruit. For reasons presently to appear, this admission was conclusive, and fully justified the finding.

3. As stated above, the evidence tended to show that the picking, grading, culling and packing of the oranges were done under defendant's supervision. There was evidence that the fruit which was packed as No. 1 had the appearance of being No. 1, and was accepted by defendant accordingly. It appears that the terms "choice" and "standard," employed in the contract, applied to both No. 1 and No. 2 oranges; that is, there was choice and standard No. 1 fruit, and choice and standard No. 2. No question was made whether the grades of the oranges as packed corresponded substantially "to the grades as determined and established by the Southern California fruit exchanges," in the language of the contract. But defendant made various offers of evidence having the general purpose to show that a large part of the oranges received by defendant from plaintiff arrived in the eastern markets in bad order, and that this was because of a latent defect in the fruit, viz., "that they lacked the inherent quality necessary to make them No. 1 fruit, having no carrying or good keeping quality." It was stated that not even by cutting an orange and examining its interior could it be determined whether it possessed "good keeping qualities," and defendant sought to prove that this could only be ascertained by its actual journey to the eastern markets. The court refused to consider such evidence, and also evidence of various other matters alleged in defendant's first and third counterclaims, except upon condition that defendant would show that it was prevented from inspecting the fruit prior to shipment, which condition, defendant admitted, it could not fulfill. It will be observed that defendant's offer of evidence was not to define No. 1 oranges as those only which arrived at the east in good condition, but it was, in effect, that oranges, in order to grade as No. 1, must possess such "keeping and carrying qualities" at the point of shipment as will prevent deterioration from inherent causes in course of transportation to the east. Defendant urges in support of the offer that by the contract plaintiff warranted that No. 1 fruit, to which defendant's guaranty of sale applied, had no latent defect which would prevent its arrival at the eastern

markets in sound and merchantable condition; that such a warranty was implied, whether the defendant be treated as a purchaser of the goods, or as a factor of the plaintiff for marketing the same. In the latter phase of the question, it is claimed that plaintiff is bound to indemnify defendant for losses incurred by it as plaintiff's agent in disposing of the fruit. In considering the matter, we may assume, in accordance with defendant's contention, that plaintiff knew the goods were sold for shipment to eastern markets, though there is nothing indicative of such a purpose in the contract. It is true, as defendant says, that any person selling or agreeing to sell goods of a specified designation or description thereby warrants that they shall be of the quality indicated by such designation or description, and it may well be that one promising to supply to his agent or factor goods for sale to others should be held bound by the same principle. But, by the contract here, plaintiff represented no oranges to be either No. 1 or No. 2—either choice or standard. Whether, and to what extent, if at all, they fell within those designations, were matters for defendant's discrimination, to be reasonably exercised at the proper time, viz., when the oranges, pursuant to defendant's order, were to be picked, packed, accepted and shipped. Then they were open to defendant's determination whether they were properly graded and culled, and its duty to accept or reject arose. Defendant made its determination when it accepted the several carloads of goods, and plaintiff's responsibility thereupon ended, by the express provision of the contract. Defendant urges that this provision meant only responsibility for the safekeeping and carriage of the fruit, and collection of the purchase money from eastern customers. We think that construction too narrow. These exemptions from responsibility are included in other and more specific provisions of the contract. Thus, by its guaranty of original sales and collections, and its agreement to make cash payment for all guaranteed sales, the defendant was clearly bound for the prices at which the oranges were sold f. o. b., whether they ever reached their destination or not, and whether defendant ever collected from its eastern customers or not. The stipulation for immediate payment apparently looked to a closed and completed transaction between the parties as to every carload of fruit sold under the guaranty. Both the contract, and the conduct of the parties under it, show with reasonable

certainty that defendant depended on its own skill and judgment to procure what it wanted; and there is no ground for saying that a warranty from plaintiff, surviving acceptance by defendant, accompanied the goods. The point is illustrated by the case of a sale of a ship's bowsprit, which the buyers had the opportunity to inspect, and which appeared at the time of delivery to be perfectly sound. After some use, it was found to be rotten. There was no fraud. Held, that the seller was not liable for the subsequent failure, and was entitled to recover the apparent value at the time of delivery: Bluett v. Osborne, 1 Starkie, 384. To similar effect, Moore v. McKinlay, 5 Cal. 471; Parkinson v. Lee, 2 East, 314; and see Bartlett v. Hoppock, 34 N. Y. 118, 88 Am. Dec. 428; Benj. Sales, 6th ed., by Bennett, p. 646, and cases cited; Tied. Sales, sec. 187, p. 273, and cases cited. Defendant having accepted the oranges as No. 1 fruit, relying on its own judgment, it is very clear, we think, that no warranty of quality was implied, even though there were latent defects in the goods, undiscoverable by the closest examination. We conclude that the court rightly refused to consider defendant's offers of evidence to support its first and third counterclaims. We have carefully considered the various cases relied on by defendant in argument (Ruiz v. Norton, 4 Cal. 355, 60 Am. Dec. 618; Polhemus v. Heiman, 45 Cal. 573; Earl Fruit Co. v. Curtis, 116 Cal. 632, 48 Pac. 793; Long v. Armsby, 43 Mo. App. 253; Gould v. Stein, 149 Mass. 570, 14 Am. St. Rep. 455, 5 L. R. A. 213, 22 N. E. 47; Maitland v. Martin, 86 Pa. 120; English v. Commission Co., 57 Fed. 451, 6 C. C. A. 416, and others), and are of opinion that they teach no doctrine at variance with the result we have reached.

4. The question raised on the exclusion of evidence to support the first and third counterclaims does not differ much from that respecting the demurrer to the second counterclaim. Counsel have discussed them together. The construction of the contract, as we find it, is determinative of both. In said counterclaim it was averred that the fifty-eight carloads of fruit delivered by plaintiff under the contract of December, 1894, were "picked, graded, culled and packed, and shipped without the approval or inspection of the defendant." This averment was contrary to the evidence at the trial, but for the purposes of the demurrer we accept it as true. It was,

however, further alleged that defendant sold to sundry of its customers, f. o. b., the said fifty-eight cars of oranges for shipment to the eastern market "as No. 1 fruit"; and from this and other allegations of the same pleading it is clearly inferable that defendant accepted the oranges from plaintiff as of that grade, and nothing is alleged to rebut the inference. Since, therefore, it was not shown, in addition to the alleged fact of the grading, culling, etc., of the oranges without defendant's inspection, that plaintiff was in some manner responsible for the failure of defendant to supervise those processes, the counterclaim makes a case of voluntary acceptance of the fruit by defendant without the inspection which, by the terms of the contract, it was its right and duty to make. Of course, then, in the absence of some fraud of plaintiff (which is not charged), the consequences of acceptance must follow as declared by the contract, viz., that the responsibility of plaintiff thereupon ceased: Moore v. McKinley, 5 Cal. 471. We need not repeat the considerations which have been already advanced on the effect of acceptance. It is not contended that the fourth counterclaim is, as a pleading, on a footing materially different from that of the second. What is said above suffices for the disposition of the demurrer to both of them. In our opinion, it was rightly sustained.

5. As to the appeal of plaintiff: Since the court found that defendant violated the contract, in refusing to agree with plaintiff on prices of oranges after March 15, 1895, and in refusing to accept any fruit after that date, the plaintiff's only ground for appeal is on the measure of damages. The court held that the recovery for those breaches should be for nominal amounts only. Both sides assume that the rule of damages is furnished by the following provisions of section 3311 of the Civil Code: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: . . . . (2) If the property has not been resold in the manner prescribed by section thirty hundred and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof if the buyer had accepted it." There was evidence tending to show that many thousands of

boxes of oranges were refused by defendant after said March 15, 1895, because plaintiff would not agree to assume the risk of deterioration thereof in transportation, according to defendant's construction of the contract, but also that plaintiff might have sold the same to others at prices equal to those defendant should have agreed on pursuant to the contract; that plaintiff did not avail itself of the opportunity to sell elsewhere, and that a large part of the total crop went to waste. On April 23, 1895, defendant sent a letter to plaintiff, in which, after proposing certain prices for oranges, defendant proceeded: "We insist upon the construction of the contract as heretofore contended for by us, and the above prices are made upon the basis of such construction. We hereby demand of you a compliance with the terms of the contract, as agreed upon between us, and will hold you responsible for any failure on your part to carry out the same." It is the contention of plaintiff that under said section 3311 the fruit lost as stated was of no value, and that it was entitled, therefore, to recover of defendant the full market prices for the same. It insists that this was more especially true of oranges lost after the date of said letter. Defendant maintains, on the contrary, that it was the duty of plaintiff to sell the oranges, when it had opportunity, to others, and not allow them to go to waste. Defendant's letter of April 23d was no more than an accentuation of its refusal to abide by the contract. True, it insisted on plaintiff's compliance with the contract, but it insisted, also, that the contract with which compliance was demanded should be something different from that which the parties had made—thus proposing a new term, and consequently a new engagement. Upon defendant's refusal to proceed further under the contract, the plaintiff was at liberty to sell the oranges to any person: Rayfield v. Van Meter, 120 Cal. 416, 52 Pac. 666. The goods were perishable, and we think it was plaintiff's right—perhaps its duty—to sell them forthwith, and in this manner reduce its damage: Hill v. McKay, 94 Cal. 5, 15, 29 Pac. 406. In any view, the value of the oranges to plaintiff, after defendant's repudiation of the contract, was not that of fruit gone to decay, but of the fruit in the condition it was when plaintiff could have sold it: Civ. Code, sec. 3353. In our opinion the judgment and order denying the motions for new trial should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying the motions for new trial are affirmed.

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## SHEPHERD v. KEAGLE, County Auditor.

Sac. No. 436; June 25, 1898.

53 Pac. 702.

**Supervisors—Expenses—Liability of Counties.**—A member of the board of supervisors, who attended a supervisors' convention in another county as one of a committee of the whole, authorized and appointed by the board so to do, cannot recover compensation from the county for his expenses, since not within the duties of the board as authorized by law.

APPEAL from Superior Court, San Joaquin County.

Action by D. C. Shepherd against A. C. Keagle as county auditor of San Joaquin county. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

James A. Louttit for appellant; Smith & Grove and W. B. Nutter for respondent.

PER CURIAM.—The board of supervisors of the county of San Joaquin passed the following resolution March 2, 1897: "Resolved, that the members of the board of supervisors of San Joaquin county be, and are hereby authorized and appointed as a committee of the whole to attend the supervisors' convention to be held in Los Angeles on April 19, 20 and 21, 1897, and to visit other county seats en route; to inspect county hospitals, jails, methods of handling, costs of administering county business, roads, etc., and to act for San Joaquin county on all matters within the law looking to better methods and more economical handling of county and government affairs at all the county seats they may visit, and report to this board." Thereafter the plaintiff, who was a member of said board of supervisors, attended the convention at Los Angeles, and visited other county seats en route, as proposed by said resolution, and in the performance of said acts necessarily expended the sum of $44.25 for traveling expenses. After his return he presented to the board of supervisors and filed with

the clerk his claim for said expenses, in proper form, which was thereupon allowed and approved by the said board, and ordered paid, and said order of allowance was properly certified to the defendant, who was the auditor of said county, and demand was thereupon made upon him by the plaintiff that he draw his warrant for said amount upon the county treasurer. The defendant refused to comply with said demand, and the plaintiff made his application to the superior court for a writ of mandate directing the defendant to draw said warrant. A demurrer to the petition was sustained by the court, and judgment entered dismissing the application. From this judgment the present appeal has been taken.

The principles involved under the facts in this case do not differ in any substantial respect from those presented in the case of Irwin v. Yuba Co., 119 Cal. 686, 52 Pac. 35, and upon the authority of that case the judgment is affirmed.

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## LESZYNSKY v. MEYER.*

S. F. No. 1071; June 30, 1898.

53 Pac. 703.

**Brokers—Compensation for Sale of Realty—Insufficient Evidence.**—On January 17, 1891, plaintiff, at London, transmitted to decedent an offer from a corporation there to purchase certain land owned by him which he accepted on conditions, one of which was that £10,000 be advanced as security for performance. On April 25th plaintiff wrote, asking that the conditions be waived. No direct response was made, and decedent, on June 2d, wrote that, unless he received notice by July 1st that the matter was closed, he would withdraw about one-half of the land from the pending proposals. No such notice was sent, but plaintiff wrote that the letter was not clear, and that he expected to hear from decedent that the proposition was satisfactory. On December 5th plaintiff wrote that the corporation would be glad to do business, and requested decedent to send someone to London to complete the negotiations as outlined in their former propositions, which letter was delivered by R. On January 15, 1892, decedent replied that he was sorry his last letter was not sufficiently clear, and that he was willing to sell on the terms proposed in their letter of January 17, 1891, or would divide the property into two

*Rehearing denied.

portions, and, if the matter was definitely settled, his son in law could go to London, provided £1,000 was paid for his expenses. On March 16th plaintiff wrote that the corporation was in liquidation, and he would try to sell the land to others. R. testified that when he delivered the letter of December 5, 1891, decedent said he knew satisfactory terms had been made between himself and the corporation about June or July, 1891, and that plaintiff had effected a sale with these parties, and that he should have gone across, and closed up the matter on the other side. Held, in an action to recover for services rendered in procuring the purchaser for the land, that there never was such a meeting of the minds of the negotiating parties as would authorize recovery.[1]

APPEAL from Superior Court, City and County of San Francisco.

Action by Julius Leszynsky against H. L. E. Meyer, administrator of the estate of Joseph P. Hale, deceased, to recover for brokerage commission. From a judgment of nonsuit plaintiff appeals. Affirmed.

George Leszynsky for appellant; A. D. Keyes for respondent.

BRITT, C.—According to the view taken by plaintiff (which for present purposes we may concede to be correct), the cause of action on which he rested his case at the trial is to be regarded as founded on the asserted liability of Joseph P. Hale for services rendered by plaintiff in procuring a purchaser for a great tract of land owned or controlled by Hale, and situated in Lower California; the reasonable value of such services being stated at the sum of $160,000. On the evidence for plaintiff the court below rendered judgment of nonsuit against him. The greater part of the evidence consisted of a series of letters passed between plaintiff at London, England, and Hale at San Francisco, California. It will be sufficient to state the effect of only a few of these. Hale died before this action was begun. On January 17, 1891, plaintiff procured and transmitted to Hale an offer in writing from a con-

[1] Cited and approved in Niles v. Hancock, 140 Cal. 162, 73 Pac. 842, where the court says: "The consent essential to a contract must be communicated by the parties to each other, and consent can be communicated with effect only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication."

cern styled usually in the correspondence the London and Amsterdam Trust Company. Such offer was a proposal to form a corporation to "take over, work, and develop the property," and to pay Hale therefor £400,000 as follows: Cash, £100,000; six per cent first mortgage debentures, £100,000; shares in such proposed corporation, £200,000. Hale replied that he would accept the offer on conditions, one of which was that said trust company should advance £10,000 cash as security for performance. April 25, 1891, plaintiff wrote to Hale, asking that he waive this condition. Hale made no direct response, but on June 2, 1891, he wrote to plaintiff saying that unless he received notice by July 1st that the matter was closed, he would withdraw about one-half of the tract from the pending proposals. No such notice was sent, but plaintiff claims that Hale's letter of June 2d was intended as an acceptance of the original offer of said trust company. The following is the more material evidence in which plaintiff sees color for this contention: July 10, 1891, plaintiff wrote to Hale that the letter of June 2d was not clear, and saying that he expected to hear from him fully that the proposition of said trust company was satisfactory. Hale made no reply to this. On December 5, 1891, the plaintiff wrote to Hale that the London and Amsterdam Trust Company "would be glad to do the business with your Lower California lands. . . . . To carry out their program it would be necessary to send over here power of attorney either to your son in law, the Honorable Mr. Boyle, or anybody else you please, to sell your land on the terms and price outlined in their former propositions"; which letter was delivered to Hale in San Francisco by one A. J. Rich. January 15, 1892, Hale replied: "I regret that my last letter should not have seemed sufficiently clear to you, and will endeavor to be more explicit in this one. I am willing to sell the whole of my property in Lower California . . . . to the London and Amsterdam Trust Company on the terms they proposed in their letter dated 17th January of last year, . . . . or I am prepared to divide my lands into two portions, and dispose of them separately [stating terms at length]. . . . . My son in law, the Honorable R. Boyle, is with me here, and, if the matter were definitely settled, he would, if necessary, go over to London to see the directors. In the event of his being sent, I should, of course, expect a sum, say £1,000, to be paid to my bankers in London for his expenses, which

sum would be deducted from the first cash payment." Replying, plaintiff wrote on March 16, 1892, that said trust company was then in liquidation, and he was trying to sell the land to other parties. Said A. J. Rich testified that when he delivered to Hale plaintiff's letter of December 5, 1891, Hale said he knew "that satisfactory terms had been made between himself and the London and Amsterdam Trust Company about June or July, 1891; that Mr. Leszynsky had effected a sale to these parties; and that he [Hale], according to his agreement, should have gone and closed up the matter on the other side."

Looking to the said letters, it is plain that there never was a meeting of minds of the negotiating parties: Masten v. Griffing, 33 Cal. 111. Hale's letter of June 2, 1891, contained no language intimating that he waived an immediate payment of £10,000; and when, in December following, plaintiff sought to continue the treaty, the provision was added that Mr. Boyle or other person in London must be empowered to sell the land on terms formerly stated. The reply of Hale was, not that he had at any time before accepted the trust company's offer, but that he was then, on January 15, 1892, willing to sell on the terms that company had proposed on January 17, 1891, and would meet the new requirement by sending Boyle to London, expecting "of course," an advance of £1,000 for his expenses. Why should Hale have proposed new terms for the sale of his land by parcels if he had, or believed that he had, previously accepted an offer for the whole? Thus the negotiation ended. The prospective purchaser went into liquidation, and Hale's demand for an advance of £1,000 for the expenses of an attorney in fact—declared by plaintiff to be necessary for closing the business—was never answered. The testimony of Rich, under the circumstances appearing, is of no consequence. At the most it tended to show only that Hale had intended to accept the offer made to him. This was not sufficient. Notice of acceptance must have been communicated to the plaintiff at least, if not to the trust company also. Granting that Hale's remarks to Rich were declaratory of either present or past acceptance of the trust company's offer, still there is no proof that Rich communicated the same to anybody, or that he had authority so to do, or that such acceptance was ever in any manner put in course of transmission to plaintiff. A contract cannot be made by manifest-

ing to strangers that assent which the law requires to be communicated mutually between the parties themselves: Civ. Code, sec. 1565; White v. Corlies, 46 N. Y. 467; Trounstine v. Sellers, 35 Kan. 447, 11 Pac. 441. The judgment should be affirmed.

We concur: Chipman, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## PEOPLE v. GILMORE.

Cr. No. 365; June 27, 1898.

53 Pac. 806.

**Criminal Law—Intoxication as a Defense.**—Under Penal Code, section 22, providing that, whenever the existence of any particular motive is necessary to constitute any particular crime, the jury may consider the fact that the accused was intoxicated at the time in determining his motive, a jury is warranted in holding accused responsible for a robbery committed while intoxicated, which he confessed to when in full possession of his faculties.

**Criminal Law—Intoxication as Defense.**—No Prejudicial Injury results from sustaining an objection to a proper question on cross-examination as to the manner of accused when intoxicated, where, by other questions to the same witness, the information sought is elicited, and the witness further testifies that accused was not intoxicated the day after the commission of the crime, when he confessed having committed it.

**Criminal Law—Intent—Reasonable Doubt.**—An Instruction concerning intent, as an element in the commission of crime, is not objectionable because it omits to state that a conclusion adverse to defendant must be one that does not admit of a reasonable doubt, where the jury were elsewhere fully instructed as to the doctrine of reasonable doubt.

APPEAL from Superior Court, Tuolumne County.

S. A. Gilmore was convicted of burglary, and appeals. Affirmed.

J. H. Daly and E. A. Rodgers for appellant; Attorney General Fitzgerald for the people.

CHIPMAN, C.—Defendant was convicted of the crime of burglary in the first degree and was sentenced to four years' imprisonment at San Quentin. He appeals from the judgment of conviction and from the order denying motion for a new trial.

1. It is claimed by defendant that the verdict is not supported by the evidence, because (1) it was inadequate to convict; and (2) the evidence introduced showed the defendant incapable of committing the crime. The contention is that the evidence showed that defendant, by reason of his intoxicated condition, was incapable of forming a guilty intent, and that there was not a single circumstance corroborative of his confession. Section 22 of the Penal Code is as follows: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." The evidence tended to show that defendant was in full possession of his faculties when he made his uncontradicted confession. In it he told where some of the stolen property could be found, and it was found there. He furnished a key to the barn in which the property was found, and remarked (which is not denied), when handing it to the officer, "It may be of use to you," and it was found useful. His confession was therefore in some substantial degree corroborated by circumstances and facts. While the evidence tended to show that defendant was "crazy drunk" during Monday, and talked in an incoherent and wild sort of way, even claiming that he was "Dunham," the hunted murderer, and while it appeared that when drunk he was in the habit of talking in an irresponsible and reckless manner, it also appeared that when sober "he was a square, straight man," and that, in fact, when he made the confession "he talked as rational as any man." The jury might well conclude that if he was so drunk as to be incapable of a criminal intent when he committed the act, he could not have remembered such details the next morning as he gave of the robbery; and so might the jury refuse to attribute to mere coincidence the fact that his story told at 11 o'clock the next

morning turned out to contain circumstances which no person in a condition of maudlin drunkenness or irresponsibility would have been at all likely to remember. We cannot say that the jury were not warranted in holding the defendant responsible for the part he took in the robbery.

2. On cross-examination the witness Jackson was asked the following question by defendant's attorney: "Q. You have seen him [defendant] around there [referring to witness' saloon] a great deal when under the influence of liquor. What was his manner and talk?" The question was objected to, and the objection was sustained on the ground that it was too general. We think the question was a proper one, but the subsequent answers of the witness show that counsel for defendant drew out the facts he desired, and it also appeared from this witness' testimony that defendant was not drunk the day after the burglary, and did not talk like a drunken man. We cannot see that any prejudicial injury resulted from the ruling of the court.

3. We see no error in the instruction complained of. It reads: "In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The essence of every crime is criminal intent, without which the offense cannot be committed. It is the intent with which an act is done that constitutes its criminality. The act and criminal intent must concur to constitute the crime. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. . . . . As to the intent or intention, you must arrive at it from all the testimony in the case, and all the acts, conduct, or circumstances shown in the case." The objection is that the latter part of the instruction commanded the jury to arrive at a conclusion as to the intent; that there was no warning given that, if adverse to the defendant, the conclusion reached must be one which does not admit of reasonable doubt. The jury were elsewhere fully instructed as to the doctrine of reasonable doubt, and also that "where two conclusions can be drawn from a single circumstance, one tending to establish guilt and the other tending toward the innocence of the accused, the law makes it your duty to accept the conclusion tending toward innocence rather than the one tending toward guilt." These were asked by and given for defendant, and we think fully informed the

jury as to how the evidence should be applied. We discover no error, and recommend that the judgment and order be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## SAN FRANCISCO SAVINGS UNION v. LONG et al.*

S. F. No. 1041; July 1, 1898.

53 Pac. 907.

**Mutual Life Insurance—Deposit of Funds—Lien.**—Under Statutes of 1891, page 126, section 2, compelling mutual assessment life insurance companies to deposit a fund for the protection of policy-holders, and section 4, providing that the beneficiaries shall have a lien on all property of the corporation, with priority over all indebtedness thereafter incurred, one who was entitled to payment of a death benefit at the time the statute became effective had a lien on such deposit as soon as it was made, the protection of the lien being not restricted to after-incurred debts.

**Life Insurance—Subrogation.—Where Sureties for a Life Insurance Company** were obliged to pay a death benefit, they are entitled to be subrogated to a lien in favor of the beneficiary on a fund created for the protection of policy-holders.

**Mutual Life Insurance Company.—Where the Holder of a Deposit Created** under Statutes of 1891, page 126, section 2, providing that assessment life insurance corporations shall deposit a certain sum for the protection of policy-holders, had brought an action to interplead various claimants to such fund, it was proper to permit a party who claimed the right to enforce a beneficiary's lien on such fund to assert such lien in the same action, and not to relegate him to a creditors' bill or a writ of execution.

**Subrogation—Assignment of Right.—The Right of Sureties** to be subrogated to a lien on their principal's property may be assigned.

**Subrogation.—Where Sureties had Paid Part of a Judgment** against the principal, which had paid the balance itself, and were entitled to be subrogated to a lien against the principal, the enforcement by their assignee of such lien to the amount paid by them is a single demand, and not obnoxious to the rule against splitting demands.

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*For subsequent opinion in bank, see 123 Cal. 107, 55 Pac. 708.

**Subrogation.—A Surety Who has not Contributed to the Payment** of the principal's judgment debt is not a necessary party to the determination of a right of lien claimed by the assignee of his cosureties by subrogation to the rights of the judgment creditor.

**Mutual Life Insurance.—Allegations That a Judgment Out of Which Defendant's** claim grew was based on a certificate of life insurance issued by a named life association to one L. M. on May 1, 1896, and in favor of M. M., who was then the wife of said L. M.; that said certificate was for the sum of $6,000; that on a certain date said M. died, and at the time the said certificate was in full force and effect, and by reason of his death, there became due and payable, etc., in the absence of demurrer or objections to their sufficiency below, sufficiently plead such policy, performance of conditions thereof, and accrual of the right of action thereon.

**Mutual Life Insurance.—Where a Lien on a Fund Created to Secure Payment** of death benefits under Statutes of 1891, page 126, sections 2, 4, relating to assessment life insurance corporations, attached pending an action on a policy, the establishment of such indebtedness by final judgment gave the right to enforce such lien, and it attached to the judgment, and continued until same was satisfied; and hence such lien did not, by virtue of Civil Code, section 2911, providing that liens shall be extinguished on the expiration of the time within which an action may be brought on the principal obligation, become extinguished on the lapse of such period of limitation from the time the lien attached.

**Mutual Life Insurance.—Where a Lien on a Fund Created to Secure** payment of death benefits under Statutes of 1891, page 126, sections 2, 4, relating to assessment life insurance corporations, attached pending an action on a policy, the establishment of such indebtedness by final judgment gave the right to enforce such lien; and, such enforcement being sought in an action begun thereafter within the time prescribed for bringing an action on the policy, the claim of lien was not barred by limitation, though more than the period of such limitation had elapsed since the lien attached.

APPEAL from Superior Court, City and County of San Francisco.

Action by the San Francisco Savings Union against E. B. Long and others. From a judgment in favor of defendant Guy Shoup and another and from orders denying a new trial the other defendants appealed. Affirmed.

Dorn & Dorn, Chas. S. Perry, Theo. Savage, T. Carl Spelling and Guy Shoup for appellants; H. C. Campbell, Lane & Lane, Byron Waters and Van Ness & Redman for respondents.

BELCHER, C.—The plaintiff is, and at all the times mentioned in the complaint was, a savings bank, duly incorporated, and doing business as such under the laws of this state. The defendant Home Benefit Life Association was organized as a corporation under the laws of this state in 1880, and from that time until on or about September 26, 1894, was continuously engaged doing a life insurance business upon the assessment plan.

In March, 1891, an act was passed by the legislature, entitled "An act relating to life, health, accident and annuity or endowment insurance on the assessment plan, and the conduct of the business of such insurance" (Stats. 1891, p. 126), which contained the following provisions:

"Sec. 2. Corporations may be formed under the general laws of this state to carry on the business of mutual insurance upon the assessment plan, and shall be subject only to the provisions of this act. No such corporation shall issue contracts of insurance until at least two hundred persons have applied, in writing, for membership or insurance therein, and have paid to the treasurer of such corporation the sum of five thousand dollars. This sum shall be invested in bonds or securities, approved by the insurance commissioner of this state, or deposited in some bank in this state, where it will earn interest. Said bonds or securities, or evidences of such deposit, shall be placed, through the insurance commissioner of this state, with the state treasurer, and the principal sum shall be held in trust for the contract holders of such corporation," etc.

"Sec. 3. Any existing corporation engaged in transacting the business of life, health, accident or endowment insurance on the assessment plan may reincorporate under the provisions of the Civil Code of this state and under the provisions of this act: provided, that it shall not be obligatory upon such corporation to reincorporate; and any such existing corporation may continue to exercise all rights, powers and privileges conferred by this act the same as if incorporated hereunder.

"Sec. 4. The contracts of insurance issued by such corporation shall specify the sum or sums to be paid upon the happening of the contingency insured against, and when such payments will be made. Unless the contract shall have been invalidated by fraud or by breach of its conditions, the cor-

poration shall be obligated to pay the beneficiary the amount or amounts specified in its contract at the time or times therein named, and such indebtedness shall be a lien upon all the property of such corporation, with priority over all indebtedness thereafter incurred," etc.

In compliance with the requirement of said act the Home Benefit Life Association on March 15, 1892, deposited in the San Francisco Savings Union, plaintiff herein, the sum of $5,000 as a term deposit, and took a "special certificate of term deposit" therefor. This certificate the said association, on the next day, by an indorsement written on the back thereof, assigned and transferred to the insurance commissioner of the state for the protection of its certificate-holders; and thereupon the said commissioner, in pursuance of the requirements of the said act of 1891, caused the said certificate to be placed and deposited with the then state treasurer, and the plaintiff was notified of the assignment at or about the time it was made. In September, 1894, the said association became insolvent, and ceased to do business. At that time the association was indebted upon contracts of insurance of deceased members in the sum of more than $50,000, and nearly all the property applicable to the payment of these claims was the said $5,000 on deposit in the plaintiff's bank. There were also more than one hundred living contract members of the association. Prior to and about the time it suspended business, several suits upon the death claims were commenced against the association, some of which had gone to judgment before this case was tried, and some were still pending. Various remedies were resorted to by said claimants for the purpose of realizing wholly or in part upon their claims, and each sought to establish a first lien upon the said deposit. Under these circumstances, the plaintiff brought this action against the conflicting claimants of the said money to compel them to interplead and litigate their several claims among themselves. The said association, the state treasurer, the insurance commissioner, and about one hundred and thirty certificate-holders, including the judgment creditors, were made parties defendant. The complaint set out the facts and stated that the plaintiff was ignorant of the respective rights of the defendants; that it had and made no claim to the said money, and was ready and willing to pay the same into court upon the surrender and cancellation of said certificate. And the

prayer was that the defendants be required to interplead; that the state treasurer and insurance commissioner be required to deposit the said certificate in court; and that thereupon plaintiff be permitted to pay into court the sum of $5,000, with the accrued dividends thereon; and that, upon so doing, the certificate be canceled by the clerk, and the plaintiff be discharged from all liability to each and all of the defendants in relation thereto. Answers and cross-complaints were filed by the defendants, setting up their respective claims and rights to the said money, and controverting the alleged rights of others thereto. When the cause came on for trial, the said certificate of deposit and the money in controversy, then, with the accrued dividends thereon, aggregating $5,743.16, were, in pursuance of an order of court duly made and entered in its minutes, deposited in court. The cause was then tried and submitted, and thereafter the court made and filed its findings of fact and conclusions of law, whereby it was found and determined that the defendant Guy Shoup had the first lien upon the money deposited in court by the plaintiff, to the extent of $4,310.10, with interest thereon, and was entitled to be first paid out of said money the sum of $4,735.87, and that the defendant Sophia Koneke had the second lien upon the said money, superior to that of all claimants except said Shoup, and was entitled to the balance of said money, less a small amount of costs, namely, the sum of $997.20; that the remaining defendants were not entitled to anything by reason of the action; and that the plaintiff was entitled to be released and discharged from all liability to any and all of the parties to the action for and on account of the said money. A decree was accordingly so entered, from which, except that portion thereof awarding a part of the money to Mrs. Koneke, nearly all of the defendants have appealed, and two of them have also appealed from orders denying their motions for a new trial.

The record presented covers more than three hundred pages of the printed transcript, and there have been several suggestions of a diminution of the record, and some of the omitted parts have been since supplied. Ten briefs have been filed on behalf of the contesting parties, and the questions discussed are numerous, and some of them complicated. The principal question relates to the rights of respondent Shoup,

and to that we shall chiefly give our attention. It is earnestly contended that Shoup had no interest in or right to any of the money, and that the court erred in awarding to him any part of it. The facts upon which the alleged rights of Shoup were based are as follows: On May 1, 1886, the Home Benefit Life Association executed and delivered to Lemuel T. Murray its certificate of membership, by the terms of which it promised to pay to his wife, Miranda E. Murray, the sum of $6,000 upon his death and upon the prior performance by him of all the conditions of the said certificate. Murray died September 29, 1886, and meantime he had complied with and performed all the conditions of the certificate of membership. Mrs. Murray made due proof of his death and of her claim under said certificate, and, by reason of his death, there became due and payable to her from the said association the sum of $6,000. In due time she demanded of the association payment of the said sum of money; but it refused to pay the same, or any part thereof, and claimed that said certificate was not in force at the time of Murray's death. In July, 1888, Mrs. Murray commenced an action in the superior court of the city and county of San Francisco against the association to recover the sum of $6,000, with interest, alleged to be due her on the said certificate. The action resulted in a judgment, rendered May 17, 1892, in favor of the plaintiff (then, by reason of her second marriage, known as and called Miranda E. Mills), and against the defendant, for the sum of $8,255.08, and $215 costs of suit. From that judgment, and an order denying a new trial, an appeal to this court was taken by the defendant association; and a stay bond or undertaking was executed and filed by it, on which W. H. Chickering and F. C. Havens were sureties. On December 26, 1894, the judgment and order were affirmed by this court (Mills v. Association, 105 Cal. 232, 38 Pac. 723); and in due time a remittitur was sent to the clerk of the court below. At the time of the affirmance there was due and owing from the defendant to Mrs. Mills the sum of $10,130.22, and of this sum the said Chickering and Havens, by reason of their liability as sureties under the stay bond, were compelled to, and did, pay from their own funds, to Mrs. Mills, in the months of April and September, 1895, $4,310.10, the balance of the judgment being paid from other funds of the association. On October 8, 1896, said Chickering and Havens sold, assigned

and transferred in writing to respondent Shoup all their right, title and interest in and to the said judgment, so partially paid and satisfied by them, and also all their interest in and claim of lien upon the money paid by the plaintiff into court in this action. Upon these facts the court found: "That the said Miranda E. Mills acquired a lien securing her claim arising as aforesaid upon the money paid into court by the plaintiff immediately upon its deposit with the plaintiff by said Home Benefit Life Association, as above found, by reason of the provision of the act of 1891, above referred to; that the lien thereby acquired was then, and ever since has been, the first lien upon said money or fund, and was and is superior and prior to all others"; and "that by reason of the partial payments made by said sureties as aforesaid, and the said assignment made by them to defendant Shoup, he (the said defendant Shoup), ever since the date of said assignment, has had and now has, the first lien upon said sum or fund of money, to the extent of said sum of $4,310.10, with interest thereon from the dates of payment thereof, as before found."

It is claimed that these findings were mere conclusions of law, and were not supported by the facts proved or found by the court. But we think it must be held that, under the provisions of the act of 1891, the indebtedness due Mrs. Mills became a lien on the money deposited with plaintiff as soon as the deposit was made. The act does not seem to limit the lien to indebtedness arising after the act was passed, but makes it apply to all indebtedness upon certificates of insurance, whether it became due and payable before or after the passage of the act. And, if this be so, then it is clear that, so far as is shown by the record, Mrs. Mills had the first lien upon the said money to secure payment of her claim; and, when Chickering and Havens paid a part of her judgment, they were subrogated to all her rights as to the amount paid. "The general rule is that a surety who pays the debt of his principal will be subrogated to all the securities, liens and equities, rights, remedies and priorities held by the creditor against the principal, and entitled to enforce them against the latter in a court of equity or of equitable jurisdiction": 24 Am. & Eng. Ency. of Law, p. 194. And see the numerous authorities cited in support of the proposition. Chickering and Havens were therefore entitled to claim and enforce the lien which Mrs.

Mills had, and, when they assigned to Shoup, he succeeded to all their rights.

But say appellants: "At any rate, neither the sureties nor their assignee may entertain any other action based upon the substitution than a creditors' bill. They may, by a supplementary proceeding, discover equitable assets, and, having discovered them, may resort, first, to garnishment or other legal process, and, upon that proving ineffectual, bring an action in equity in the nature of a creditors' bill to subject them to the satisfaction of the judgment. But, if such action and such proceeding are not needed, they can only resort to an execution." This proposition cannot be sustained. Evidently, Shoup was compelled to assert his rights in this action, if he would assert them at all. The action was one of interpleader, in which all the claims to the money in controversy were to be disposed of. It admitted necessarily the assertion of equitable as well as legal rights, and the court was authorized and empowered to adjust them all.

It is next urged that the right of the sureties was a mere equity, and was not assignable; and, in support of this proposition, Sanborn v. Doe, 92 Cal. 152, 27 Am. St. Rep. 101, 28 Pac. 105, is cited. That case has no bearing upon the question in hand. It related to a question of fraud, and it was simply held that "a right to complain of fraud is not assignable."

"The rule against splitting demands" is also invoked, and it is claimed that under it respondent was not entitled to recover. But that rule does not apply here. The association paid a portion of the judgment, and the sureties paid the balance of it. After the judgment was paid, there remained but one demand, and that was held by the sureties. No question, therefore, as to "splitting demands" could be involved.

Appellants further say: "Even if a part of such claims were assignable, there would still exist a defect of parties; and there could be no final determination of the rights of the parties unless the judgment creditor and the other obligor on the bond were before the court." But the judgment creditor, Mrs. Mills, was before the court, and the other obligor, Mr. Allen, paid nothing, and had no claim to be satisfied.

It is also claimed that the answer and cross-complaint of defendant Shoup stated no cause of action entitling him to any equitable relief; and it is said: "There is not a single

allegation upon which to base a claim to this or any form of equitable relief, even if that act covered the Mills claim"; that "the terms of the certificate or policy of life insurance are not set forth or even mentioned"; and that the pleading "does not allege the performance of any of the conditions of any certificate or policy of life insurance" by Murray, nor the furnishing of any proofs of his death. The answer and cross-complaint, after setting out the facts in relation to the judgment recovered by Mrs. Mills, the appeal therefrom, etc., alleged "that the said judgment so rendered in favor of said Miranda E. Mills was based upon a certificate or policy of life insurance issued by said Home Benefit Life Association to one Lemuel T. Murray, on May 1, 1896, and in favor of said Miranda E. Mills, who at said last-named date was the wife of said Murray; that said certificate was for the sum of $6,000; that thereafter, and upon the twenty-ninth day of September, 1896, the said Murray died; and that at said time the said certificate was in full force and effect; and that, by reason of his said death, there became due and payable," etc. No demurrer to the pleading was filed, nor, so far as appears, was any objection to its sufficiency raised in the court below. We think, therefore, it must be held to have stated all the facts necessary for the purposes of this action, and that the objections to it cannot be sustained.

It is objected that, at any rate, respondent had no lien on the deposited money, and counsel say: "I know of no law which gives one whose life is insured a lien on the property of the insurer, or which makes the insurer a debtor to the insured." But that, in cases like this, the beneficiary of the insured may have a lien on the property of the insurer was expressly declared by the act of 1891; and it was so held in Kruger v. Association, 106 Cal. 98, 39 Pac. 213.

It was further objected that the Shoup claim was barred by the statute of limitations; and, in support of this objection, counsel cite section 2911 of the Civil Code. That section is as follows: "A lien is extinguished by the lapse of the time within which, under the Code of Civil Procedure, an action can be brought upon the principal obligation." The section is not a statute of limitation, but relates alone to the extinguishment of liens. The question, then, is, Had the lien of the Mills-Shoup claim become extinguished before Shoup filed his answer and cross-complaint? We do not think it

had. An action upon the principal obligation was brought in 1888, and was pending when the act of 1891 was passed. The deposit was made March 15, 1892; and thereupon, under section 4 of the act, Mrs. Mills' claim became a lien upon the money deposited, which might be thereafter enforced, provided the claim should be established as a valid indebtedness. When judgment was recovered in the action, the judgment became a lien on the money, and continued to be so until the amount thereof was or shall be paid. It was not necessary for Mrs. Mills to change her pleading, and ask for an enforcement of the lien, as it did not become merged in the judgment, but was attached to it and accompanied it to the end. It is evident, therefore, that the lien claimed by Shoup had not become extinguished.

Nor do we think, if the statute of limitations had been properly pleaded, as it was not, that Shoup's claim of lien would have been barred. The lien is statutory, and exists until the indebtedness which it secures is satisfied. Mrs. Mills' claim was not finally established until December, 1894, when her judgment was affirmed by this court, and she was not required to assert any right to a lien before that. This action was commenced March 31, 1896, and Shoup's answer and cross-complaint was filed October 9, 1896. This was in time, and his claim was not then barred.

Many other points are made and very elaborately and ably argued by counsel, but to review them would require this opinion to be extended to a very great length. We have carefully considered all the points made, and are of the opinion that no error calling for a reversal is shown; and as the judgment and order must be affirmed, if we are right in what has already been said, any discussion of the other points presented seems unnecessary. We advise that the judgment and order appealed from be affirmed.

We concur: Chipman, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

## In re MURDOCK'S ESTATE.

Sac. No. 452; July 7, 1898.

53 Pac. 792.

**Accounts of Executors.—An Order in Probate Court Settling the First annual account of executors, which strikes out certain items for sums paid to experts and detectives in investigating an alleged fraudulent claim against the estate, on the ground that the court is unable to examine such items because the executors object to disclosing the particulars for fear of defeating their object, is not erroneous, where leave is given to restate such items in some future account.**

APPEAL from Superior Court, Glenn County.

In the matter of the estate of William Murdock, deceased. From an order made on the hearing of exceptions to the executors' first annual account, they appeal. Affirmed.

F. C. Lusk (Richard Bane of counsel) for appellants; Reddy, Campbell & Metson for respondent.

PER CURIAM.—The executors of the last will and testament of William Murdock, deceased, filed their first annual account in the superior court of Glenn county, and one Mary Helen Murdock, claiming to be a creditor of said estate, filed exceptions thereto, and the executors appeal from the order made upon the hearing of said exceptions. After publication of notice to creditors, Mary Helen Murdock presented to said executors a claim against said estate upon an alleged promissory note purporting to have been made by said testator on September 5, 1877, for the sum of $100,000, payable to her order twenty years after date, "with interest at one per cent per month from date until paid." This claim was presented August 22, 1894, and was not then due. The executors held said claim for ten days without allowing or rejecting it, whereupon said claimant elected to consider the claim rejected and brought suit thereon, but dismissed it shortly afterward.

The question principally discussed by counsel for appellants concerns the right of said claimant to contest said account, it being contended that the presentation of her claim did not comply with the requirements of section 1494 of the

Code of Civil Procedure, in reference to the presentation of claims not due; that it was therefore nugatory, and gave her no standing to contest the account. Some other questions incidental to the right of said contestant to be heard were also raised; but unless the order made by the court settling the account was itself erroneous, it cannot be reversed because of errors occurring at the hearing, so that the only material question upon this appeal is whether that order is erroneous.

Several items were ordered to be retired from the account, with leave to the executors to restate them in some future account. These, so far as complained of, relate to compensation paid by the executors to an expert in handwriting and certain detectives employed by them in investigating the claim of the contestant based upon said alleged promissory note, which if valid, would amount at maturity to $340,000; and the ground upon which these items were retired was that the executors having objected to disclosing the particulars of their services, for the reason that it might defeat the object sought to be attained, namely, the defeat of the alleged fraudulent claim of contestant, the court could not sufficiently investigate the character and value of the services rendered to enable it to determine whether those items should be allowed. We think this action of the court was proper, and that the executors were not prejudiced thereby. No opinion is expressed upon the other questions discussed, for the reason that it is not necessary to a decision of this appeal, and questions which may arise in other proceedings should not be now anticipated; and if the questions discussed and not decided upon this appeal should again arise, the parties will not be prejudiced or concluded by the action of the court below in this proceeding, except as to the order settling said account, which is hereby affirmed.

## FOX v. GRAYSON.

S. F. No. 1447; July 14, 1898.

53 Pac. 932.

**Injunction—Appeal.—When It is not Clear That a Reversal** of an order dissolving a temporary injunction would have no legal effect, a motion to dismiss an appeal therefrom on that ground will not be sustained.

Appeal from Superior Court, City and County of San Francisco.

Action of one Fox against one Grayson. From an order dissolving a temporary injunction plaintiff appealed, and defendant moves to dismiss the appeal. Motion denied.

W. T. Baggett for appellant; Deal, Tanszky & Wells for respondent.

PER CURIAM.—Motion to dismiss the plaintiff's appeal from an order dissolving a temporary injunction, upon the ground that a reversal of the order would have no legal effect, and consequently that the questions raised by the appeal have become mere abstractions. It is not clear that a reversal of the order would have no legal effect. Motion denied.

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## PRICE v. SPENCER.

## LAYSON v. SAME.

S. F. No. 1068; July 21, 1898.

53 Pac. 1073.

**Deceit.—Evidence of the Intrinsic Value of Stock** is not admissible in an action for false representations as to value thereof, it having a well-known and fixed market value, and the inquiry having been as to this.

APPEAL from Superior Court, Fresno County; Stanton L. Carter, Judge.

Two actions against L. A. Spencer—one by Fannie Price and the other by M. A. Layson. From adverse judgments plaintiffs appeal. Affirmed.

W. H. Layson for appellants; F. H. Short for respondent.

SEARLS, C.—An appeal was taken in both of the above-entitled causes upon the same record, and it is stipulated, in substance, that they embody the same pleadings, facts and questions of law, and that "the judgment or order of the supreme court in said case of Price v. Spencer shall be the judgment and order made in the case of Layson v. Spencer," etc. Under this stipulation, we shall omit all further mention herein of the case of Layson v. Spencer, and confine ourselves to the case of Fannie Price v. L. A. Spencer, subject only to a final disposition of the two cases. The complaint charges in substance:

(1) That in April and May, 1893, defendant undertook, as the agent of plaintiff, to purchase for her some shares of the capital stock of the Fresno Loan and Savings Bank, a corporation. (2) Defendant was an officer, to wit, teller, in said bank, and well knew the value of the stock thereof, but the value thereof was unknown to plaintiff. (3) To induce plaintiff to purchase said stock, defendant falsely represented to plaintiff that the stock was worth from $129 to $130 per share, and was paying, and would pay, semi-annual dividends of $6 per share. That defendant professed to know an old man in San Francisco who would sell a few shares of the stock at $112 per share, which he said was very cheap. That plaintiff, relying upon these representations, requested defendant to purchase for her five shares at $112, and forwarded to him $560 therefor. That defendant retained the money, and fraudulently transferred to her, on the books of the corporation, five shares of the capital stock belonging to himself, all of which he concealed from plaintiff. (4) Since January, 1893, the bank has paid no dividends. When the stock was transferred to plaintiff, it was, as defendant well knew, worth no more than $65 per share. (5) Plaintiff did not know until November, 1894, that the stock was the property of defendant; and she immediately gave notice of the rescission of the contract, offered to return the stock, and demanded a return of her money, all

of which was refused by defendant. (6) All of defendant's representations were false, and made to deceive, and did deceive, plaintiff.

There is another cause of action, stated in like words, showing that plaintiff, under like circumstances, purchased three other shares of the same capital stock at the same price.

Plaintiff prays for a decree adjudging the sale to be rescinded; that defendant holds in trust for plaintiff $896; that he pay the same over, with interest; and for costs.

The answer denies that the defendant undertook, as agent or otherwise, to purchase for plaintiff any shares of the capital stock of the Fresno Loan and Savings Bank; avers that he did, at the request of W. H. Layson, the attorney of plaintiff, procure from one Harvey Phinney five shares of said stock, and caused them to be transferred to plaintiff, for which she paid $112 per share. He denies that he was ever the owner of the stock, or had any interest therein, except that he purchased the same for $110 per share only when he found a purchaser therefor at $112 per share, and that the stock was thereupon transferred from Harvey Phinney directly to plaintiff, and that the interest of the defendant therein was but the $2 per share which he retained. Without further particularity, it may be said the answer denies all the allegations of fraud, and the facts upon which the same are predicated. The answer to the second cause of action proceeds upon the same lines as that to the first. The findings of the court negatived all the charges of false or fraudulent representations by defendant, alleged to have induced the purchase of the stock by the plaintiff; found that the defendant was not the owner of the stock purchased by plaintiff, but that he purchased the same, as the agent of plaintiff, at $110 per share, and charged her $112 per share, retaining to his own use the difference of $2 per share, amounting in the case of plaintiff to $16, which sum defendant held in trust for the plaintiff; and the latter had judgment for said sum of $16, and for her costs of suit.

The testimony in the case was sharply contradictory upon most of the issues, and, by all the precedents, the findings of the court below in such a case are conclusive here. Counsel for the appellant argues his case mainly from the standpoint of plaintiff's testimony, rather than from a review

of the whole case as made. Assuming his alleged facts as established, little difficulty would be experienced in reaching his conclusions. This we may not do, in the face of the record. Defendant admits in his answer, substantially, that he did, at the request of plaintiff, receive from one Harvey Phinney the stock in question, for which the plaintiff paid, and that he retained to himself $2 per share. This constituted him, pro tanto, the agent of the plaintiff. According to the findings of the court, this retention of $2 per share constituted the whole of defendant's offending. Appellant, however, contends that the evidence shows that defendant was the owner of the stock, and sold the same to plaintiff, concealing the fact of such ownership, etc. It is true that there was some evidence tending to show, if taken by itself, that defendant owned the stock. But, in the interpretation which appellant places upon it, it proves too much for her case. The agent of plaintiff was W. H. Layson, her brother. In the spring of 1893 he visited Fresno, in quest of an opportunity to invest some money for his two sisters, the plaintiffs in the two cases; called upon defendant, the teller of the bank aforementioned, with whom he had a conversation in reference to the bank and its stock; learned from defendant that a man had some of the stock for sale. Layson, on the 7th of May, wrote defendant, asking: "Is the stock you spoke to me about still for sale, or part thereof? What is price? I have forgotten." On the eighth day of May, defendant answered, in part, as follows: "I have still twenty-seven shares on hand. . . . . Can sell at same price as offered you ($112 per share) if sold at once." Later in May, Layson wrote the Fresno Savings Bank as follows: "Inclosed find draft for $896. Buy L. A. Spencer eight shares of Fresno Savings and Loan Bank stock—five shares for Fannie Price, three shares for M. A. Layson—not exceeding $112 per share. What does stock sell for in the market? [Signed] Layson." The draft was payable to the bank. On receipt by the bank of this letter and draft, defendant went to Harvey Phinney, who had previously offered to sell stock at $110, took him to the bank, where eight shares were transferred from Phinney to Fannie Price and M. A. Layson, as directed by their agent, W. H. Layson, and the certificates forwarded to their agent, W. H. Layson, in the name of the bank; the actions,

however, being formulated in the name of the bank by its teller, the defendant. On the 17th of June the bank received a like order from Layson for three shares, which were procured by the defendant from Phinney, through his agent, one Frank Laning, and transferred directly to plaintiff herein, as in the former case. In 1894 plaintiff ascertained that defendant had purchased the stock at $110 per share, and demanded of him the $2 per share which he had overcharged them. In response, defendant replied that: "I sold the stock to you fairly. Now, after I tell you that, practically, and, I believe, legally and morally, I owned the stock that I sold to you," etc. We have said that, if this evidence proves that defendant was the owner of the stock, it also proves too much. On their theory, they were informed by him before the purchase that he had the stock for sale, and if they knew this, and ordered it purchased from him, it is not perceived that there was any agency on his part, or that, in the absence of fraud, they had any cause for complaint. On this theory, there is no estoppel that can be urged against defendant. The case of Bank of Woodland v. Hiatt, 58 Cal. 234, simply holds that a purchaser has a right to rely upon representations of the seller as to facts not within the purchaser's knowledge, and the fact that the purchaser might by inquiry have obtained knowledge of the facts will not relieve the seller from responsibility. In the present case, if the seller was the owner of the stock, his first act in the premises was to inform the plaintiff of that fact. But we need not pursue this inquiry further. The court found that defendant purchased the stock as the agent of plaintiff, and that he was never the owner thereof. This finding is amply supported by the evidence. As before stated, the seller took or caused his stock to be taken to the bank, where it was indorsed and transferred by the bank to the plaintiff; and, as the bank held plaintiff's checks for the purchase price, we may reasonably infer that it paid the sellers. The defendant was the medium through which the transaction was consummated, and the fact that the seller did not know the purchaser is, upon the showing made, a circumstance of little importance. The whole pith of the transaction may be embodied in few words: The bank in question was, as a going concern, a prosperous institution, paying large dividends. Its stock had a well-defined market value at from $110 to $115 per share, and had been much

higher. Soon after plaintiff's purchase, there was a bank panic, under the pressure of which it closed its doors for a few days; then opened again, and struggled along until 1895, when, its securities and assets having shrunk greatly, it went into liquidation, and its stock fell to, say, one-half its former price.

Certain testimony was received at the trial in reference to the value of the property belonging to the bank in question, which was afterward stricken out. This ruling is assigned as error. The only object of such testimony was to show the intrinsic value of the stock. Under some circumstances, such testimony would doubtless be proper. Here, however, the stock was shown to have had a well-known and fixed, though variable, market value. It was as to this market value that plaintiff inquired from defendent and others before making her purchase. It afforded a fixed and certain standard of value, and was the proper criterion of such value. It was not, therefore, error to confine the evidence to such standard.

Numerous other errors in rulings made upon the trial are specified by appellant, most of which we think not well taken, and, as to all others, that a different ruling would not have affected any finding of fact or justified a different result. I advise that the judgment and order appealed from in each of the above-entitled cases be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from in each of the above-entitled cases are affirmed.

## MORE v. MILLER et al.*

## SAME v. MORE—No. 1104.

S. F. No. 897; July 21, 1898.

53 Pac. 1077.

**Appeal.—Time for Appeal by Interveners Commences** to run from time complaint in intervention is stricken out for want of interest, not from time of judgment between original parties.[1]

**Administrators.—Judgment Against One as Administrator is** invalid, he having been removed after submission of the cause, but before judgment, notwithstanding pendency of his appeal from order of removal. It may, however, be entered against him nunc pro tunc, as of the date of submission.

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by H. Clifford More, administrator of Lawrence W. More, deceased, against John F. More, administrator of Alexander P. More, deceased. Eliza M. Miller, afterward made special administratrix of Alexander P. More, deceased, and C. A. Baldwin, intervened. From order dismissing complaint in intervention, and from judgment for plaintiff against original defendant, interveners appeal. From order vacating said judgment, plaintiff appeals. Interveners' appeal dismissed. Order affirmed on plaintiff's appeal.

Whitcomb & Boyle for plaintiff; Thos. McNulta, A. G. Eells and J. B. Mhoon for interveners.

BELCHER, C.—H. Clifford More, as administrator of the estate of Lawrence W. More, deceased, duly presented to John F. More, as administrator of the estate of Alexander P. More, deceased, a claim for allowance, amounting to the sum of $13,670.14. The claim was at first allowed in part by the administrator and the probate judge, but thereafter the allowance was revoked and recalled by both the admin-

*Appeal dismissed. See 129 Cal. xviii. For opinion on rehearing, see post, p. 110.

[1] Cited in Pedley v. Werdin, 7 Cal. Unrep. 360, 99 Pac. 975, as authority, with other cases, for the rule that "an appeal taken before the judgment is entered of record is premature and must be dismissed."

istrator and the judge, and the claim entirely rejected. Thereupon this action was brought to establish the claim, as provided in section 1498 of the Code of Civil Procedure. The defendant administrator answered the complaint, and within proper time Eliza M. Miller and C. A. Baldwin, by leave of the court, filed a complaint in intervention, alleging that Alexander P. More died intestate on October 21, 1893, leaving an estate, consisting principally of land, of the value of more than $500,000; that the interveners were sisters of the decedent and his heirs at law, and upon his death became, and ever since had been, seised in fee and possessed of the said landed estate; and denying that any sum of money whatever was due or owing from the said estate to the plaintiff. Subsequently, on motion of the attorney for the plaintiff, the court made an order "that the order made herein allowing said Baldwin and Miller to file their complaint in intervention be, and hereby is, vacated and set aside, and that said complaint be, and hereby is, stricken out and dismissed." This order was based upon the ground that it did not appear that the interveners had any interest in the matter in litigation in said action, or in the success of either of the parties thereto, or an interest against both. It was dated October 31, 1895, and a copy thereof was served on the attorney for the interveners on November 5, 1895. The case was afterward tried, and on May 29, 1896, submitted for decision. On December 16, 1896, findings were filed, and on January 15, 1897, judgment thereon was entered that the plaintiff "do have and recover from said John F. More, as the administrator of the estate of Alexander P. More, deceased, or his successor as administrator of said estate," the sum set forth in his rejected claim and demanded in his complaint, with interest and costs of suit. From this judgment and the order dismissing their complaint in intervention the interveners served and filed notice of appeal on February 15, 1897, being the appeal designated No. 897. Thereafter, on April 2, 1897, the attorneys for John F. More, as administrator, and for Eliza M. Miller, as special administratrix, of the estate of A. P. More, deceased, after due notice, moved the court to vacate and set aside the said decision and judgment upon the ground that both said decision and judgment were inadvertently and improvidently made by the court, in that they were made and

entered against said John F. More, as administrator of the estate of Alexander P. More, deceased, payable in due course of administration, whereas at the time and times when each and both were so made and entered as aforesaid the said John F. More had ceased to be such administrator, his letters of administration having been revoked and annulled by an order of said court duly given and made in the matter of the estate of Alexander P. More on the twenty-first day of September, 1896. At the hearing of the motion, by agreement by and between the attorneys for the moving parties and the plaintiff, entered upon the minutes of the court, it was admitted "that upon proceedings duly had and taken in the said superior court . . . . in the matter of the estate of Alexander P. More, deceased, . . . . then and now pending in said superior court, and by orders duly given and made by said court in said matter, the powers of the said administrator of said estate, John F. More, defendant herein, were on the first day of June, 1896, suspended until the further order of the said court; that said Eliza M. Miller was on the fourth day of June, 1896, appointed special administratrix of the said estate; and that by an order of the said superior court in said matter, made and dated on the twenty-first day of September, 1896, it was ordered that the letters of administration issued to the said John F. More by said court, and dated February 12, 1894, be revoked and annulled, and that the said John F. More be restrained from further exercising any of the rights or duties as such administrator; and that said John F. More, as such administrator and individually, thereafter, on the twentieth day of November, 1896, duly and regularly took and perfected appeals to the supreme court of the state of California from said order, and from the whole thereof, and that said appeals are now pending and undecided in said supreme court." After the hearing the court, on April 13, 1897, granted the motion, and ordered the said decision and judgment vacated, annulled and set aside. From this order the plaintiff appealed, the appeal being designated No. 1104.

1. The only question involved in the first appeal (No. 897), which it is necessary to consider is, Was the appeal taken in proper time? As the law stood at that time, an appeal from an appealable order or judgment was required to be taken within one year after the order is made or

the judgment entered: Code Civ. Proc., sec. 939. "Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken": Code Civ. Proc., sec. 956. Here the appeal was taken more than a year and three months after the order was made striking out and dismissing the complaint in intervention. That order disposed of the interveners' rights as parties to the suit, and had the force and effect of a judgment against them, and was in our opinion, appealable. In Stich v. Dickinson, 38 Cal. 608, the appellant filed a complaint in intervention, to which the defendants demurred on the ground that it did not state facts which entitled the intervener to intervene, inasmuch as it did not show that the intervener had any interest in the matter in litigation, in the success of either of the parties, or against both or all of them. The demurrer was sustained, and a judgment was thereupon entered against the intervener, from which he appealed. It was claimed by the respondents that the appeal was prematurely taken, there having been no final judgment in the action as between the original parties to it. But it was held that the judgment against the intervener was final, and that the appeal was properly taken. The judgment was accordingly reversed, with directions to the court below to overrule the demurrer to the intervention. And in People v. Pfeiffer, 59 Cal. 89, which was a proceeding for the condemnation of land, the appellant made application for leave to intervene in the proceeding. "The court made an ex parte order permitting him to present and file a complaint in intervention, but subsequently, after filing the complaint, set aside the order, refused to allow him to intervene, and dismissed his complaint. From the judgment of dismissal the appellant took no appeal, as he might have done"; citing Stich v. Dickinson, supra. After a judgment of condemnation was entered, the appellant appealed from that judgment, but it was held that he was not a party to the action, because his suit to be made a party was rejected, and his appeal was dismissed. The cases cited by appellants, as declaring a different rule, are not in point. They are cases where a pleading, or part of a pleading, of one of the

parties to the action had been stricken out on motion; and it was held that the order of the court, not being itself appealable, might be reviewed on appeal from the final judgment. The cases above cited seem to be decisive of the question in hand, and it must, therefore, be held that the appeal from the order striking out the complaint in intervention was not taken within the time allowed for that purpose, and hence cannot be considered on its merits.

2. The question involved in the second appeal (No. 1104) is, Was the judgment rendered against "John F. More, as the administrator of the estate of Alexander P. More, deceased," invalid, he having been removed from his trust, and having ceased to be administrator of the estate some months before the judgment was entered? If it was, there was clearly no error in setting the judgment aside on motion. It has been held in this state that a judgment rendered in favor of or against a party to the action after his death is a nullity, and, although it is not void on its face, it may be set aside on motion: Ewald v. Corbett, 32 Cal. 493; McCreery v. Everding, 44 Cal. 284; Elliott v. Paterson, 65 Cal. 109, 3 Pac. 493. It has also been held in other jurisdictions that where an executor or administrator is removed from his trust, he ceases to have any connection with the estate, and no judgment relating to its affairs can be rendered against him. In Wiggin v. Plummer, 31 N. H. 251, it is said, on page 266: "He ceases to be a party to the action on removal from his trust as absolutely as if he were dead, and the action must either be prosecuted against the new representative of the estate or it will be discontinued. . . . . When the administrator is displaced, he ceases to have either interest in or power over that estate, and a judgment to reach the estate must be rendered against the party entitled to represent it. The judgment also must be for a sum to be levied of the goods and estate of the deceased in the hands of the defendant administrator, to be administered. Such a judgment cannot be rendered against one who appears by the record not to be administrator." In National Bank v. Stanton, 116 Mass. 435, it is said: "Upon her removal from the office of executrix, her liability to and right to defend against this action ceased. It follows that no judgment therein can be rendered against her." In Re Dunham's Estate, 8 Ohio C. C. 162, it is said: "We are of

the opinion that the judgment, having been rendered after the cessation of the powers of Mrs. Dunham as executrix, was wholly void as evidencing the existence of a claim against the estate." And in Taylor v. Savage, 1 How. (U. S.) 282, 11 L. Ed. 132, it is said by the supreme court of the United States, Taney, C. J., delivering the opinion: "By his removal from the office of executor he was as completely separated from the business of the estate as if he had been dead, and had no right to appear in or be a party in this or any other court to a suit which the law confided to the representative of the deceased."

It is objected, however, for the appellant that the effect of the order removing More from his trust as administrator was suspended by his appeal therefrom until the final determination of the appeal, and that meantime he continued to be the administrator of the estate; citing In re Moore's Estate, 86 Cal. 72, 24 Pac. 846. That case simply holds that pending an appeal from an order removing an administrator of an estate he is suspended from office, and it is within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order or removal becomes final. It is true that pending the appeal from the order removing More he was only suspended from the office of administrator. But after the removal he ceased to be practically and in effect the administrator of the estate. He could exercise no powers and perform no duties as such. "He was as completely separated from the business of the estate as if he had been dead." The appeal did not revive or in any way restore his powers. "The effect of an appeal from an order setting aside a judgment is not to revive the judgment. The judgment no longer exists, so far as the assertion of any rights under it is concerned, until it shall be brought into force again by a reversal of the order setting it aside. . . . . The code does not provide that an order appealed from shall cease to exist—be annulled—but that it cannot be further enforced by a proceeding upon it. Here the revocation of probate and the surcease of appellant's functions as executor became complete eo instanti the order of revocation was entered": In re Crozier's Estate, 65 Cal. 332, 4 Pac. 109. We conclude, therefore, in view of the well-settled rules of law, that after More was

removed from his office as administrator no judgment could properly be entered against him as such administrator, and that there was no error in setting the judgment in question aside.

Undoubtedly the judgment might have been, and we think should have been, entered against the defendant nunc pro tunc, as of the date of the submission of the cause for decision; and it may be so entered now, on the going down of the remittitur on this appeal: Fox v. Mining Co., 108 Cal. 478, 41 Pac. 328. We advise that appeal No. 897 be dismissed, and that the order involved in appeal No. 1104 be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal No. 897 is dismissed and the order involved in appeal No. 1104 is affirmed.

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## WRIGHT v. PACIFIC COAST OIL CO.

S. F. No. 828; July 27, 1898.

53 Pac. 1086.

**Employer's Liability.—Plaintiff had Been for Seven Years in Charge** of stills for distilling petroleum, and inspected the bottoms, and notified defendant, the owner, when they were to be replaced. The life of a bottom was about five and a half months, and at the end of four months he would begin inspections, making them after every run. He knew the danger of the bottoms giving way, and whether they had been regularly inspected. A crack being discovered in a bottom, plaintiff and the superintendent knelt down and looked at it, neither thinking of any danger. At the superintendent's suggestion, plaintiff then proceeded to remove a burner to prevent the oil in it being caked, and while standing in front of the still the bottom gave way, and a quantity of asphaltum ran out, burning plaintiff. Held, that the injury was caused by an unforeseen accident, resulting from the inevitable impairment of the still, of which plaintiff had equal means of knowing with defendant, and he could not recover.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by W. H. Wright against the Pacific Coast Oil Company. There was a judgment for plaintiff, and from the judgment and an order denying a new trial defendant appeals. Reversed.

Van Ness & Redman for appellant; Tappan & Simpson for respondent.

HAYNES, C.—This appeal is by the defendant from the judgment and an order denying its motion for a new trial. The defendant is a corporation engaged in the business of refining lubricating and illuminating oils, and in November, 1895, the defendant was in its employ as a "stillman," and while so employed received personal injuries, and prosecutes this action to recover damages therefor. Upon the premises of defendant there were eight small vats or stills which were operated by the plaintiff. These stills are circular, are seven feet in diameter and about five feet high. They rest on a brick foundation three or four feet high, and are inclosed with brick, forming a jacket. The bottom of the still is formed of a sheet of steel riveted to the base of an angle iron, and the sides are riveted to the perpendicular part, thus forming a vat shaped like a tub, the top, or cover, having a manhole, through which access may be had to the inside. About eighteen inches below the bottom is a grate upon which coke is placed, and where the fire, fed by an oil spray, burns. These stills are filled with petroleum to within about a foot of the top. The oil is heated to a high temperature, and the vapors are conveyed by pipes to the receiving house, and condensed. When the process is completed the oil is evaporated away until only the asphaltum is left, and that is coked on the bottom of the still. When sufficiently cooled, the asphaltum is dug out, and the still is charged for another run. The process ordinarily requires eighteen or twenty hours to bring the contents down to a coke, and the cooling, cleaning out and recharging occupy the remainder of two days. The bottom of the still, being exposed to great heat, lasts about five or five and a half months, and when a new bottom is required the still is taken down, and the rivets connecting the bottom with the angle iron are cut, and a new bottom put in. The greatest heat being at the center, that part is first to wear out. The bottom soon begins to sag at that point, and the sag increases

the longer it is used, and as the bottom becomes thin minute cracks are made, through which a seepage or sweating occurs, creating a moisture on the bottom when a new charge is put in or before it is fired up. After a bottom had been used about four months inspections of the bottom began to be made by the stillman by pumping a quantity of oil into the still, and then going under it with a torch and examining the bottom. If it was found to be moist, it was deemed insufficient for another run, and would be reported by the stillman to the superintendent, who would either direct a new bottom to be put in, or have the boilermaker test it with a hammer to ascertain its strength.

The circumstances more immediately connected with the accident are that the plaintiff was in the receiving-house, and was informed by another employee that one of his stills was on fire. The plaintiff testified that he ran to the still and found a dense smoke pouring out, and immediately opened the damper, thus allowing the smoke to pass up the flue. He then opened the furnace doors, and, kneeling down, looked at the bottom of the still, and observed a small crack near the center of the bottom, through which he says he saw oil dropping down into the fire box. That he looked at it for a very brief space of time, and got up off his knees, and found the rest of the employees there, and Mr. Miller, the superintendent. That he and Miller both got down and saw the crack and what was going on. Then both stood up quietly for a second or so, and the superintendent said: "Well, I guess it won't get any worse; I guess it will take up"; and directed the other employees to go about their work, and then said to the plaintiff: "Wright, you disconnect that burner." That he went and got a pair of tongs to disconnect the burner (which fed the oil to the fire under the still), and gave it one or two turns to loosen it, and then took his hands to it. That he was standing in front of the furnace doors, which were then closed, when he heard a great roaring sound, and was immediately enveloped in flames. His hands were badly burned, and his face to some extent. The oil had been shut off from the burner by some one at the first alarm. The immediate cause of the flame bursting out was that a hole was broken in the center of the bottom of the still, letting

a quantity of the asphaltum or refuse fall on the coke fire underneath.

The principal controversy as to the facts relates to the removal of the burner, in which the plaintiff was engaged at the time he was burned. The plaintiff testified that he was ordered to remove it, and Mr. Miller testified that he said to him: "If you take off the burner, it will save from carbonizing." The burner consists of a small pipe which conveys the oil into the furnace, that pipe being inside of a larger one, which conveys steam. The steam-pipe is drawn to a nozzle, and is grooved or rifled spirally on the inside, thus spraying the oil. These pipes, or burner, are twelve or fifteen inches long, projecting a few inches inside the furnace wall. The reason for removing it was that when the oil and steam were shut off some oil would be left in the burner, and the heat of the furnace would evaporate the pure oil, and leave a residuum which would carbonize, or coke, and thus clog the burner to some extent, and cause trouble in cleaning it out. The burners are sometimes taken off during the run for the purpose of cleaning or adjustment. The plaintiff testified that removing the burner would prevent coking, and that "the taking off the burner had nothing to do with the flame shooting out—nothing whatever. I did not make any protest against taking off the burner when Mr. Miller directed me to do it. I had no objection to that. I did not regard it as an improper thing to do, under those circumstances." Upon being asked how long it would require to stand there to take the burner off, he replied: "Half a minute."

The plaintiff had been in defendant's employment about ten years, and for seven years next before the accident had been in charge of these stills. He testified that he had never been instructed to examine the bottoms of the stills with a torch, but had always done so out of a desire to make himself useful and to retain his place. The superintendent testified that the stillmen were always instructed to do so; that it was part of their duty; that the boilermaker who put in the bottoms never examined the stills unless the stillman reported that they required attention; and this is not denied by the plaintiff, nor does he deny that it was always understood to be his duty.

Upon his examination in chief the plaintiff, after describing the mode of examination with a torch, was asked: "Did you make such an inspection as you describe on this particular still prior to the accident? A. Yes, sir. Q. How long prior? A. Couple of weeks. Q. With what result? A. Found nothing that would indicate the necessity of reporting that it was played out, or gone in." Plaintiff further testified: "The bottom becomes very thin in course of time from being used over the fire. They get down almost as thin as a piece of paper. After they have been in use about four months I begin to inspect them to see whether or not there is any sweating or seepage underneath. If they are wet underneath, then I don't use them. I notify Mr. Miller that that bottom needs to be taken off and a new one put on, and Mr. Miller has Mr. Bird do it. . . . . I cannot recall that Mr. Miller ever gave me any specific instruction to do that. I knew it was expected of me. I can't recall how I came to get into the habit of inspecting. I had been doing that, adopting that method, for fully four or five years. . . . . It gradually came to be understood to be a portion of my duties to examine the bottoms before using them; everybody so understood it."

An explanation made by Mr. Miller throws light upon this method of inspecting the stills. These bottoms are made of steel, and when new are five-sixteenths of an inch in thickness. So long as the contents of the still remain in a liquid state the fire does not injure the bottoms; but when it is no longer a liquid, in the coking stage, the bottom is brought to a white heat and is slowly burned away. The first cracks occur in the cooling process, and, if any exist, upon putting in the cold petroleum and before the fire is started, the sweating or moisture on the outside of the bottom shows them, even when they cannot be seen or otherwise detected; and, if no moisture appears, it is known to be good for another run, since the cracks will not occur until the next cooling takes place. Hence the necessity for regular inspection, when from the age of the bottom, or its sagging in the center, weakness is indicated. In this case the bottom was found to be scarcely thicker than tissue paper.

It is therefore apparent, first, that it was plaintiff's duty, under his employment as stillman, to inspect these bottoms

when they had been in use about four months, and regularly thereafter, and, when cracks were indicated by the moisture, to report to the superintendent; and, second, having decided, as he must have done by making an inspection at about the regular time, that his duty required him to commence the inspection of this particular still, it was his duty to continue these inspections; and, if it was his duty to commence the inspection two weeks before the accident, it was negligence on his part to omit it during the whole of that time, the still being freshly charged every second day, thus furnishing six or seven opportunities for inspection after the one made and before the accident. Upon this point he testified: "When the convexity began to get considerable, and I knew that the still had been in a period of four months or thereabouts, I would make it my business, after every charge had been cleaned out, to put in one or two barrels of oil, shut off the supply, and go down and make this examination with a torch, and not until I discovered seepage would I report. I might be making these examinations a couple of weeks or longer before the seepage would manifest itself. The seepage was the customary and usual test." Much more of the testimony of the plaintiff, as well as of other witnesses, might be quoted, tending to show that it was the duty of the plaintiff to inspect and report to the superintendent the condition of the stills. Upon that question there is no conflict.

At the conclusion of the evidence on behalf of the plaintiff, the defendant moved for a nonsuit upon the ground that the evidence failed to show any actionable negligence upon the part of defendant, and while said motion was under discussion plaintiff asked and obtained leave to amend his complaint. The original complaint alleged that it was not his duty to have control or supervision of the stills, and that he did not exercise any custody or supervision over them; that said vat or still was imperfectly constructed, defective, inadequate and unsafe; that such unsafe condition could have been discovered by the defendant by the exercise of ordinary care, and was unknown to the plaintiff; that while he was engaged in heating oil and standing in front of said vat, which was filled with oil, it cracked across the bottom by reason of the imperfection and defectiveness aforesaid, and thereby the contents of the vat ran

out and burned the plaintiff. The amendment added, in substance, that while the vat was in said cracked and unsafe condition, which was unknown to the plaintiff, the defendant, knowing its contents, negligently, and without the exercise of common prudence, ordered plaintiff to remove a certain burner which was located above the furnace door, and while plaintiff, in the execution of said order, was standing in front of the furnace door, the vat cracked entirely across the bottom, and the contents ran out, etc. Defendant objected and excepted to the order permitting the amendment. The motion for a nonsuit was renewed, with the statement, in addition to the former, that the averments of the amendment are not justified by the evidence, and that no negligence on the part of defendant is shown. The nonsuit was denied, and defendant excepted.

It would seem to be clear that in the absence of the amendment the nonsuit should have been granted. So far as the condition of the vat or still is concerned, no negligence on the part of the defendant is shown, while the testimony of the plaintiff is clear and explicit that it was his duty to examine the bottom of the still and report its condition to the superintendent. Whether that duty was originally imposed upon him as a part of his employment, it is not necessary to inquire. He had assumed it, if it was not imposed upon him, and continued it for at least four or five years, and knew that it was expected of him. If at any time he concluded it was too burdensome, or the responsibility too great, he should have informed the superintendent, and given him an opportunity either to employ someone as stillman who would perform the duty, or otherwise provide for its performance. The citation of authorities to this proposition would be superfluous. There is not one word of testimony tending to show that the vat was improperly or imperfectly constructed, or that it was defective, inadequate or unsafe, save from use, as to which it was the duty of plaintiff to watch and report.

I do not think it necessary to discuss or determine the question whether the court erred in permitting the plaintiff to amend his complaint; for, conceding that the amendment was properly allowed, no case was made thereunder which would justify a verdict for the plaintiff. The plaintiff testified that the removal of the burner had nothing to

do with the fire or the giving way of the bottom of the still. The only possible connection it had with the accident was that it brought him for about "a half minute" in front of the furnace doors. Giving the plaintiff the benefit of the doubt as to whether the removal of the burner was ordered, or merely suggested, by the superintendent, it does not appear that the plaintiff had not as full knowledge of any possible danger as the superintendent. He had been for seven years in charge of these stills. No one, whatever his station, could be more familiar with them. Indeed, no one knew so well as the plaintiff whether there was danger of the bottom of the still giving way. He knew how long it had been in use, and he alone, so far as the evidence discloses, knew whether or not it had been regularly inspected. Before the superintendent reached the still, plaintiff had opened the furnace doors, kneeled down in front, looked at the bottom of the still, and testifies that he saw a small crack about an inch long and about as thick as a knife blade. When the superintendent arrived he and the plaintiff both got down in front of the furnace and looked at the bottom, and the crack seemed to be closing. Neither of them appears to have apprehended any danger to themselves. The superintendent certainly did not, as he had a right to believe that it had been inspected when the still was filled at the beginning of the run, and therefore, though leaking, was sufficiently strong to sustain the weight within. There was no intention of continuing the run of that still. The oil spray had been turned off, though the coke was still burning, and the bricks were red hot. Nothing could be done but to let the fire burn out and the still cool. The removal of the burner was solely to prevent the oil within it being coked by the heat of the furnace, and was regarded by the plaintiff as a proper thing to do under the circumstances.

At the time of the accident the run was approaching completion. The contents of the still were reduced to twelve or fourteen inches of asphaltum. The small crack which was seen by the plaintiff only leaked "a little thin spray," and, according to the testimony of the plaintiff, Mr. Miller said it would take up. "Take up is the equivalent of cake up, or coke up." The accident did not occur because of anything, whether gas or oil, that escaped through that crack,

or that could by any possibility escape through it in the condition of the contents of the still, which had been reduced to twelve or fourteen inches of asphaltum. The conduct of both the plaintiff and Mr. Miller in getting down with their faces before the furnace door and watching it is conclusive of that fact, as the red or white heat of the bottom showed that the contents were reduced to a thick condition, which could not pass through a crack such as the plaintiff described. The accident was caused by a portion of the bottom, about the size of a man's hat, breaking out in the center of the bottom, and thus permitting a quantity of the asphaltum to fall upon the coke fire underneath. That was an occurrence which neither of them anticipated, and which, if likely to occur, should have been more readily anticipated by the plaintiff, who had the better opportunity of knowing the condition of the still, and whose duty it was to watch and report its condition whenever he deemed it unsafe. It was not the case of a latent defect in the material or construction of the still, but a case where the still wears out from use, and is under the immediate care of the employee who is charged with the duty of ascertaining and reporting its condition to his employer.

These works had been in operation, under the supervision of Mr. Miller, some sixteen years, and during all that time the same tests as to the sufficiency of the still bottoms had been used without accident. The plaintiff was not a new or inexperienced man. He had been in charge of these stills for seven years. He had not only an equal opportunity of knowing the condition of this particular still, but a better opportunity than the superintendent. That neither apprehended danger to the person is clear, not only because both got down in front of the furnace to inspect it, but because the plaintiff not only acquiesced in the direction to remove the burner, but testifies that he regarded the order as proper under the circumstances. Even if it were conceded that plaintiff had continued to make the torch inspections of the bottom up to the time the last charge was put in the still, we see no negligence or fault upon the part of the superintendent of which the plaintiff can complain. The plaintiff's actual knowledge was at least equal to that of the superintendent, while his means of knowledge were greater. Where an employee, with his own consent, has undertaken,

as a part of his employment, the duty of determining when an appliance which he constantly uses has become unsafe or insufficient from such use, and especially where he has shown himself capable, from long experience, to do so, he cannot hold his employer liable for an unforeseen accident resulting from its expected and inevitable impairment. One of the essential conditions of the right of recovery in case of defective appliances is "that the servant did not know of the defect, and had not equal means of knowing with his master": Wood, Mast. & Serv., sec. 414; Malone v. Hawley, 46 Cal. 409. This seems to have been understood by the plaintiff to be the law, since in his amended complaint he alleges that defendant knew the dangerous condition of the vat, and that he did not. The evidence does not sustain this allegation. Plaintiff testified that the average life of the still bottoms was from five to five and a half months. He had been in charge of these eight stills for seven years, and therefore he had probably seen at least one hundred and twelve of these bottoms worn out and replaced. In Shearman & Redfield on Negligence, section 287, it is said: "The true definition is that, when circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire. A servant is charged with actual notice as to the matters concerning which it was his duty to inquire; and especially should this rule be applied where the servant's action is founded upon the assumption that the master ought to have known of something which he did not actually know."

It is true the superintendent saw the crack from which he testified he saw gas escaping; but he further testified that that frequently occurred, and no evil results or dangers followed; that cracks appeared during the coking part of the process, when the still bottom had ample strength to sustain the weight resting upon it; and that, in an experience of about twenty-five years in the oil-refining business, he had never before known of such an accident occurring; and that, if no cracks were shown by sweating or seepage when the still was charged with cold oil before the fire was started, it was always considered safe for the run, unless the sagging of the bottom was unusual; and as to the condition of the still at the time it was charged for that run the plaintiff had, or should have had, full knowledge, while the superintendent had no knowledge, and had a right to rely upon plaintiff

having discharged his duty in that regard, and we have already seen that the giving way of the bottom was wholly unexpected by both. If, therefore, we assume that the plaintiff had continued his inspection after each run, as it was his duty to do, and found no indications of dangerous weakness at the time the still was charged, neither the plaintiff nor the defendant were guilty of any negligence, and in such case there is no liability; and, if the inspections were not continued by the plaintiff, the superintendent, having the right to rely upon the plaintiff having discharged his duty and made the required inspection at the beginning of the run, was, through the fault of the plaintiff, in ignorance of facts essential to the formation of an intelligent opinion as to the condition of the still, and whether or not there was danger in being near it. Several exceptions were taken to instructions given to the jury, some of which we think were rightly taken, but, in view of the full discussion of the case, we think it not necessary to discuss them here. They will sufficiently appear from what has been said. We advise that the judgment and order appealed from be reversed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

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## BREEDLOVE v. NORWICH UNION FIRE INS. SOC.

L. A. No. 360; July 23, 1898.

54 Pac. 93.

**Insurance—Interest of Insured.—The Purchaser of Mortgaged Property** did not record her deed until after suit brought to foreclose the mortgage. Before expiration of time for redemption, an insurance policy was issued to her, which stated her interest in the premises as being her building, and provided that, unless her interest was not truly stated therein, it should be void, and that it was to be void if such interest was not unconditional and sole ownership. Held, that, in view of Civil Code, section 2888, which provides that a lien on property transfers no title, the policy correctly stated insured's interest, her failure to record the conveyance only affecting her title as against a purchaser at the foreclosure sale, if there should be no redemption.

APPEAL from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Mary Breedlove against the Norwich Union Fire Insurance Society. From a judgment for plaintiff and from an order denying a motion for a new trial defendant appeals. Affirmed.

John G. North for appellant; Collier & Evans for respondent.

PER CURIAM.—Action on an insurance policy. George L. Bush was the owner of the property on the tenth day of March, 1894, and on that day conveyed it to the plaintiff. At that time it was subject to a mortgage that had been made by him April 24, 1893, to one Cowgill. An action to foreclose this mortgage was commenced against the mortgagors October 3, 1894, and judgment therein was rendered December 22, 1894, and under this judgment the property was sold to Cowgill January 31, 1895. The plaintiff did not record her conveyance from Bush until October 13, 1894, and she was not made a party to the foreclosure suit. After the sale under the judgment, and before the time for the execution of the sheriff's deed, viz., July 13, 1895, the policy sued on was issued to the plaintiff, and the insured property was destroyed by fire July 23, 1895. There was no written application for the insurance. The policy contained the following clause: "This entire policy shall be void if the interest of the insured in the property be not truly stated herein. . . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . . if the interest of the insured be other than unconditional and sole ownership." The only statement in the policy relating to the character of the plaintiff's interest was as follows: "Mary Breedlove, $2,500 on her two-story frame, metal-roof building." The court found that the defendant issued this policy to the plaintiff "by and through its duly and legally authorized agents, Jarvis & Bush (composed of B. B. Bush and John T. Jarvis), of Riverside, Cal.," and that these agents had full knowledge, at the time the policy was issued and the premium paid, of the foreclosure proceedings and of the deed to plaintiff by Bush. It is admitted that Bush & Jarvis were the agents of defendant, and no question is made as to the loss, or of the

value of the property, or of the service of due notice of the fire and making proofs of loss.

The point that the findings do not support the judgment presents the principal question involved. The finding is "that on the thirteenth day of July, 1895, plaintiff was the owner of the two-story frame, metal-roof building, situate, etc., . . . . and was such owner at the time of its insurance and destruction by fire, as hereinafter mentioned." Appellant contends that the facts as found show that the plaintiff was not the unconditional and sole owner, because she held title from the mortgagor, whose mortgage was foreclosed, and only an equity of redemption remained to her, and therefore she violated her warranty when she represented herself to be the unconditional and sole owner. There is no dispute as to the title or estate in the property held by the plaintiff. She was the purchaser from the mortgagor and former owner of the property before the right of redemption had expired. No evidence of fraud appears, and the rights of the mortgagee are in no wise involved. As a purchaser from the mortgagor, she stood in his shoes, and with the same right to take out an insurance policy. A mortgage in this state only creates a lien upon the mortgaged property, and transfers no title to the property: Civ. Code, sec. 2888; McGurren v. Garrity, 68 Cal. 566, 9 Pac. 839. Bush did not cease to be the sole and unconditional owner of the property after the execution of his mortgage to Cowgill, and by his transfer to the plaintiff she became its sole and unconditional owner. Her ownership is not subject to any condition, nor did any other person own an interest in the property. While her failure to record her conveyance until after the proceedings for the foreclosure of the mortgage had been commenced would prevent her from claiming title as against the purchaser at the foreclosure sale, if there should be no redemption, it did not impair her title. She was not a party to the foreclosure proceedings, and her title to the land would not be directly affected thereby, except that, by reason of her failure to file her conveyance, she would be estopped from claiming the premises, as against the purchaser, in case a deed should be executed to him. When she became the purchaser from Bush, she had a clear right to take out a policy of insurance, and when she represented in the policy that she was the "unconditional and sole owner" it was true, notwithstanding the proceedings in foreclosure.

In this view of the matter it is unnecessary to determine whether the agents of defendant knew the facts relating to the mortgage and the foreclosure proceedings, and therefore waived any warranty of plaintiff, for there was no question of waiver necessarily involved. Her warranty was not violated. Nor is it necessary to discuss the point as to whether all the conditions of the policy were performed, for the contention that they were not is based solely upon the claim that the evidence shows her title to be conditional by reason of the mortgage. And so, also, it becomes immaterial whether the court did or did not find that she truly stated her interest in the property, as it fully appears what that interest was, and that it was the unconditional and sole ownership. The judgment and order are affirmed.

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## WEBB et al. v. KUNS et al.

L. A. No. 365; July 25, 1898.

54 Pac. 78.

**Work and Labor—Pleadings and Findings.**—A complaint alleged that plaintiff was to be paid a reasonable sum for extra work as to a certain contract, and also the performance of the work. The finding showed the performance of the work, its acceptance by defendants on a certain day, and that "defendants agreed to pay therefor the sum of ten dollars." Held, that the finding was not that the work was done for an agreed price; hence there was no variance.

**Mechanic's Lien.**—In an Action to Foreclose a Mechanic's Lien, a mistake in the complaint in regard to the terms of the contract, as to time of payment, where the contract, the notice of lien, and the findings show the facts, is immaterial.

APPEAL from Superior Court, Los Angeles County; W. H. Clark, Judge.

Action by W. E. Webb and others against N. Kuns and others. From a judgment in favor of plaintiffs and an order denying a new trial defendants appealed. Affirmed.

C. K. Holloway for appellants; Tanner & Taft for respondents.

TEMPLE, J.—This action was brought to foreclose a mechanic's lien for the sum of $82.50. The appeal is from the judgment and from an order denying a new trial. The general point is that the evidence is insufficient to sustain the finding, and under this an attempt is made to show a variance between the findings and the allegations of the complaint in two respects. As I think no material variance is shown, I will not consider whether the point can be made under the specification.

1. The complaint avers, in accordance with the terms of the contract and the statement in the claim of lien recorded, that plaintiff was to be paid a reasonable sum for any extra work; also that extra work was done. It is found that these allegations are true, and in addition "that the plaintiff performed all the extra work mentioned in the complaint, and fully completed the same, and same was accepted by the defendants on the said eighteenth day of October, 1895, and the defendants agreed to pay therefor the sum of ten dollars." There is no variance—not even an inconsistency. The finding is not that the work was done under a contract for an agreed price, but to the contrary, and that after it was done defendants accepted it, and agreed to pay therefor $10. This was an admission that it was worth $10.

2. The complaint states that three-fourths of the contract price was to be paid during the progress of the work, and the balance thirty-five days after completion. The contract, the claim of lien, and the findings are to the effect that $100 of the contract price was to be paid upon completion, and the balance thirty days after completion. The contract is correctly described in the notice of lien which was filed. A valid lien was therefore created. The mistake in the complaint was utterly immaterial, as defendants could not have been misled thereby. It is evident that the appeal is frivolous and vexatious. It is therefore ordered that the judgment and order be affirmed, with $50 damages allowed respondents.

We concur: McFarland, J.; Henshaw, J.

## FAIRBANKS et al. v. ROLLINS.

L. A. No. 368; August 4, 1898.

54 Pac. 79.

**Water Rights.—Performance of a Contract to Convey** "a good and sufficient water right" for the irrigation of a certain parcel of land was sufficiently tendered by an offer of water certificates issued by an irrigation corporation, guaranteeing the holder a flow of water of the quantity specified in the contract, together with a right of way through a pipe-line reaching the lands to be irrigated for the conveyance of water "represented by said water certificates." [1]

**Finding.—A Finding of an Ultimate Fact cannot be Impeached** by an immaterial finding of a mere probative fact.

APPEAL from Superior Court, San Bernardino County.

Action by C. W. Fairbanks and another against J. M. Rollins on a note. Judgment for plaintiffs and defendant appeals. Affirmed.

C. C. Haskell for appellant; Otis, Gregg & Hall for respondents.

BRITT, C.—By a contract in writing of date February 10, 1897, the plaintiffs agreed to sell and convey to defendant a "good and sufficient water right" for the irrigation of a parcel of land containing four and twenty-two hundredths acres, the same to be sufficient to furnish water to the amount of at least one-seventh of an inch, measured under four-inch pressure to each acre or fraction thereof in said parcel of land; in consideration whereof defendant agreed to execute to plaintiffs his promissory note for the sum of $500, and to pay the same when plaintiffs should tender to him a conveyance of said water right. He made to plaintiffs his note accordingly, and this is an action to enforce payment thereof. In his answer, the defendant pleaded said contract, and averred that the only offer of plaintiffs to perform the same

[1] Cited, with other cases, in Fresno Canal etc. Co. v. Park, 129 Cal. 441, 62 Pac. 88, the court holding that, notwithstanding an apparent departure in the decisions from the old rule of an absolute right of private property in a water flow, in the absence of a maximum rate fixed by the board of supervisors a contract for water as made by the owner can be enforced.

consisted in the tender to him of five so-called "Class A Water Certificates" issued by the Bear Valley Land and Water Company, a corporation, together with the tender of a right of way through a certain pipe-line reaching his land, for the conveyance of the water "represented by said water certificates." The form of said certificates was set forth in the answer. Thereby the said corporation in terms guaranteed to the holder thereof a flow of one-seventh of an inch of water for each acre of land to which the water was to be devoted, etc. It was further averred in the answer that said certificates constitute no water right; that they do not and cannot vest in or transfer to the holder thereof any water or water right whatever; and that they are of no value. There were other allegations in the answer to the effect that said certificates evidence a fictitious increase of the capital stock, and also of the indebtedness of said corporation, and that it had no lawful authority to issue the same. The court found that plaintiffs made a tender substantially as alleged in the answer of defendant. It also found that such tender was an offer to convey a water right in accordance with the terms of said contract of February 10, 1897; that said certificates entitled the holder to the water described on the face of the same, and were of the value of at least $500; and that such certificates "convey and transfer the water and water rights represented on their face." There were also findings of evidential matters concerning the organization and powers of said corporation, and the origin and history of the said certificates issued by it. Judgment was for plaintiffs. Defendant relies for reversal on the contents of the findings alone.

The findings of ultimate facts above stated show that the consideration upon which said note was executed has not failed; and that, by the acceptance of the tender made to him, defendant would have received the transfer of the "water and water rights represented on the face" of said certificates, viz., a flow of one-seventh of an inch of water for each acre to be irrigated, which was the object of his contract with plaintiffs. Defendant claims that the objections urged by him to the validity of said water certificates are sustained by the said findings of evidence regarding the issuance thereof. We do not concede that; but, if we should, still those findings which respond to the substance of the issue, and show that plaintiffs offered to convey rights of water

as required by their contract with defendant, would not be overthrown. The case is within the rule which forbids the impeachment of findings of ultimate facts by comparing them with other findings of mere probative facts which have no proper place in findings at all: Rowe v. Blake, 112 Cal. 637, 44 Pac. 1084; Rankin v. Newman, 107 Cal. 608, 40 Pac. 1024, 41 Pac. 304; Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740. The judgment should be affirmed.

We concur: Chipman, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## WARD v. YORBA.*

L. A. No. 372; August 2, 1898.

54 Pac. 80.

**Vendor and Vendee.—A Contract to Convey by Good Title was** made between persons, both of whom claimed the premises by paramount title; but at the time of making the contract the vendee, acting on the advice of counsel, conceded the vendor's title to be the better one. The vendor testified that he agreed to convey only his interest, which was corroborated by another, and not denied by the vendee. Held, that a finding that the provision requiring a good title was inserted by mistake was justified.

**Vendor and Vendee—Mistake.—The Vendor and the Vendee Each** claimed the premises by paramount title, and the vendee's counsel erroneously advised him that his title was inferior. The vendee knew all the facts on which this advice was based, and thereupon contracted to buy the vendor's interest. Held, that he was not entitled to be relieved from the contract on the ground of mistake, under Civil Code, section 1577, defining a mistake as an unconscious ignorance or forgetfulness of a material fact, or a belief in the existence of a material thing which does not or did not exist.

**Vendor and Vendee—Consideration.—The Vendor and the Vendee Adversely** claimed land in the former's possession worth $9,000, the vendee claiming under an attachment for $1,300. Held, that the vendee's agreement to purchase the vendor's interest for $4,750 was supported by a valuable consideration, though it afterward appeared that the vendee's title was the better one.

*For subsequent opinion in bank, see 123 Cal. 447, 56 Pac. 53.

APPEAL from Superior Court, Los Angeles County; Waldo M. Yorke, Judge.

Action by Shirley C. Ward against Vicente Yorba to reform a contract to sell lands, and for specific performance as reformed, and for damages. Judgment for plaintiff, from which, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Geo. H. Smith for appellant; A. M. Stephens for respondent.

CHIPMAN, C.—Action to reform a contract of sale and purchase of a certain parcel of land situated in the city of Los Angeles, and to specifically enforce the same when reformed, and for damages. The pleadings are verified. Plaintiff had judgment from which, and from the order denying a new trial, defendant appeals upon a statement of the case. The findings are quite lengthy, but the salient facts may be briefly summarized as follows: The premises in controversy originally belonged to one Francisca D. de Labracco, and both plaintiff and defendant claim title through this common source—plaintiff by sale on execution to one Jarvis (who conveyed to plaintiff) at suit of one Bacon; and defendant by attachment proceedings at his own suit. Plaintiff's deed took effect as of date March 31, 1892, and defendant's March 5, 1892, by relation. The validity of defendant's attachment proceedings was in dispute at all the times mentioned in the findings. The property involved was worth $9,000. A suit was pending against Labracco, in which one Javier Yorba and one Davilla were plaintiffs, wherein it was claimed that Labracco was trustee of the title for plaintiffs in that suit; but it was found that defendant had knowledge of this action, and claimed to be able to control it. There was also a judgment lien for $312.75 on the property, of which defendant had full knowledge at the time he entered into the contract, the subject of the controversy. Plaintiff was in possession under his deed, and on February 10, 1893, the parties began negotiations looking to the sale by plaintiff and the purchase by defendant of plaintiff's interest in said property for the sum of $6,000, at which time both plaintiff and defendant believed defendant's attachment lien to be subordinate to the judgment lien through which plaintiff claimed title. On

February 24, 1893, a controversy arose between the parties as to their respective claims, the defendant claiming that his right was superior to plaintiff's; and on that day defendant offered to sell his interest to plaintiff for $1,300 (the amount of his judgment in the attachment), or he would pay plaintiff $4,750 for his interest in the property, which latter proposition plaintiff accepted, and a written agreement was accordingly on that day entered into; but by mistake the agreement was drawn so as to obligate plaintiff to convey a good and perfect title, whereas the agreement was that he should convey only his interest in the property. Defendant knew all the facts relating to the title at the time the agreement was entered into, and was acting upon the advice of counsel then present. Defendant agreed to pay $100 cash in hand, which was done, and $4,650 in thirty days, which he failed to do. The consideration to defendant was plaintiff's compromise of his claim of superior title, dependent upon defendant's imperfect attachment proceeding mainly. The court, as conclusion of law, found that plaintiff was entitled to judgment (1) reforming the contract as prayed for, and (2) for the sum of $4,650, with interest at seven per cent per annum from March 24, 1893, amounting in all to $5,789.25, and for costs of suit; and judgment was accordingly entered. Appellant relies upon the written contract, which it is conceded respondent cannot perform. Respondent claims that he can perform the actual agreement, and stands ready to do so. We do not understand appellant to dispute that the findings support the judgment, but his contention is that the evidence does not support the findings. We assume that the points relied upon are those presented in the briefs of respective counsel.

1. Appellant insists that the evidence fails to show that the actual agreement was different from the written agreement, or that there was any mistake in the drafting of the latter, and that it devolved upon respondent to make out a good title, which it is found he failed to do. Appellant concedes that a "vendor may stipulate that the purchaser shall accept the title as it is," but he adds that "such conditions should be looked at with great jealousy, as they are often traps for the unwary, and the court should at least expect the fact to be broadly stated that the seller only sells such title as he has, without warranting the same"; citing 1 Sugd. Vend., pages

29, 30 (24), and pages 455, 456 (390, 391); Haynes v. White, 55 Cal. 38, and other cases. If the evidence clearly showed that the actual agreement was as it was found to be by the court, the case is brought within the principle invoked. Upon this point the evidence is somewhat, but not seriously, conflicting. On the day the contract was entered into there met in the office of Mr. Meserve—respondent's attorney—Mr. Meserve and respondent; Mr. Munday, appellant's then attorney, and appellant; and Mr. Sanchez, who was brought in by and as interpreter for appellant, who could not himself "talk or understand English." Mr. Unger, who made the abstract, was present part of the time. As to what took place at this meeting, which resulted in the contract being signed then and there, Mr. Meserve, Mr. Munday and Mr. Ward, respondent (and Mr. Unger to some extent) testified on behalf of respondent, and Mr. Sanchez and appellant on behalf of appellant. We have carefully read this testimony, and while there is a decided and sharp conflict as to one or two facts that will be noticed hereafter, as to the fact that respondent was offering to sell only whatever interest he had in the property the evidence is clear, and is not denied by appellant in his testimony; and on his cross-examination Sanchez testified: "Q. Did you hear Mr. Meserve tell Mr. Munday all we were selling was the right, title and interest such as was acquired under the Jarvis deed? A. Yes, sir; I heard Mr. Yorba say he thought he could control the Davilla suit. He said, 'I can fix it with my brother and mother all right.' This was at the time of signing the contract." It was testified to by respondent's witnesses, two of whom understood some Spanish, that what was said by and to appellant's attorney and by and to respondent's attorney during the negotiations was communicated to appellant by the interpreter. We think there was sufficient evidence to support the findings, and that the parties understood perfectly that respondent was selling and appellant was buying only such interest or title as respondent then had, and that the written instrument did not express the true intent of the parties in this regard. The contract was drawn by respondent's attorney as soon as the parties had reached an agreement, and both signed it. How it happened to be drawn as it is was not explained by any witness. It was drawn by the attorney of respondent (who is himself an attorney), and it is urged that on this account

the rule in such cases should apply with especial force. Section 1639 of the Civil Code provides that "when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title." Section 1640 reads: "When through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded." Here the ground relied upon is mistake, and it is urged that in actions of this kind the mistake must be "clearly made out by proofs entirely satisfactory"; citing 1 Story, Eq. Jur. 152 et seq.; Leonis v. Lazzarovich, 55 Cal. 52; Hutchinson v. Ainsworth, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82. It was said in the latter case: "The conclusion from the sum of all the authorities on the subject is, not that relief must necessarily be denied because there is a conflict of testimony, for that would result in a denial of justice in some of the plainest cases calling for such relief, but that upon all the proofs, taking the facts as they appear to the court after eliminating testimony unworthy of credence, or based upon mistake or uncertainty, as in other cases, the mistake must be established in a clear and convincing manner, and to the entire satisfaction of the court." As was said in that case, so say we here, "Viewed in this light, and we cannot say the court was unauthorized by the testimony in the conclusion it reached." The draftsman did not attempt to explain how he came to make the mistake, and probably could have given no rational explanation had he been asked to do so. That it was a mistake clearly appears, we think, by great preponderance in the evidence; and, that being so, an explanation as to how it happened is unimportant and immaterial.

2. It is contended that appellant's consent to the contract was not free, but was induced by the mistaken belief that the title was in respondent, and that appellant was purchasing a valuable interest in the property, and that he was clearly entitled, upon discovery of the mistake, to rescind the contract, and that this he immediately offered to do. It appears from the testimony of appellant and the witness Sanchez that Mr. Munday advised appellant that respondent's title was superior to appellant's. Appellant testified: "I then told Mr. Sanchez to ask Mr. Munday what chance I had in that

suit. Then he answered me that I had no right in the world in the matter, except to bring suit or to buy the property." At another point in his testimony he said: "Mr. Munday told me that I had no right to the property whatever; that the attachment that I had was second to the one that Mr. Ward had. I found out that I did have title to that property—that Mr. Munday's advice was erroneous, when I went to you [speaking to his then counsel, Mr. Smith], which was about March 27, 1893." It appears from the evidence of both Meserve and Munday that up to the time the parties met in Meserve's office, February 24th, each of them believed that he had the better title through the sheriff's sales; and in order to convince Meserve, respondent's attorney, of his error, the negotiations on that day were suspended while they went to the clerk's office to consult the records, after which, and after consulting the notes of the abstract of title prepared for defendant, Meserve conceded Munday's position. There was, however, some question as to the regularity of the attachment proceedings by which appellant got his title, which the court found was at all times a subject of dispute between the parties. Mr. Munday, in rebuttal of appellant's testimony, testified that appellant was mistaken as to the time he was told he had no title; that it was some days before February 24th, and certainly prior to the making of the contract; and that he (Munday) did not know till that day that his client's title was superior to respondent's. There is much evidence tending to show that appellant knew all the facts as found by the court at the time he signed the contract, and that he was not then ignorant of the supposed strength of his own title. Mr. Munday testified: "The abstract was there before us, and I was buying what there was. I do not think 'perfect title' was mentioned, or any understanding of perfect title used. I understood it in this way: I stated to the parties the exact status of the title as I found it from the records—from this abstract or memorandum—there in your office. After that, and upon that, Mr. Yorba authorized me to make the offer of four thousand five hundred dollars. The Court: Question. For what? A. For whatever appeared on this— As a matter of fact, he said he could control this, these outstanding liens—these outstanding suits, rather; didn't care anything for them. . . . . Then—it was possibly my own suggestion—we split the difference between four

thousand five hundred dollars and five thousand dollars, making four thousand seven hundred and fifty dollars. One hundred dollars was paid, and a receipt given for it, and the contract was written out by Mr. Meserve. I looked it over. Everybody seemed to be satisfied. I went out with Mr. Yorba. Tried in different places to borrow money for him." We are unable to see that appellant was misled in any way by any representations of respondent, and, if he acted through any mistaken belief of the strength of respondent's title or the weakness of his own, his action was in the face of full information then in his own control and that of his attorney. He acted not only upon means of knowledge available, but upon actual knowledge. There is no fraud or unfairness alleged or proved, and we are unable to see why appellant should not be held to the performance of the contract fairly and intelligently entered into by him. Section 1577 of the Civil Code, relied upon, has no application, because there was not "an unconscious ignorance . . . . of a fact material to the contract"; nor was there a "belief in the present existence of a thing material to the contract which did not exist."

3. It is claimed by appellant that there was no adequate consideration for the contract. It is not claimed by appellant that there was any fraud practiced upon him, or that there was anything unfair in the transaction. His claim rests wholly on the alleged mistake he made in supposing respondent's title superior to his own. But we have seen he was not mistaken, but acted with full knowledge of the record title of respondent. It appears, however, that respondent was then in possession of the premises. He disputed the regularity of appellant's attachment proceedings, while admitting that, if the lien was valid and legal, his deed took effect prior to respondent's deed; and it appears that an action is now pending in the lower court between appellant, as plaintiff, and respondent, as defendant, involving the regularity of said attachment proceedings, which action was determined in favor of this appellant, and was "tried . . . . and submitted at the same time as the trial and submission of this action," and it was this attachment which the court found was at all times a subject of dispute between the parties. It is in evidence, and was found by the court, that the property was worth $9,000. Appellant's judgment under which

he claimed was for $1,300, and he claimed to be able to control the other pending action of Yorba and Davilla against Labracco; and he knew of the judgment lien of $312.75 in the action of Bacon against Labracco. There was therefore nothing unconscionable or unreasonable in his agreeing to pay $4,750 for respondent's title or claim to property which had cost appellant $1,300, and was worth $9,000. We think there was sufficient consideration to support the contract. By it all of respondent's rights were extinguished, and possession to be surrendered, and all litigation avoided. There was some value to appellant in these considerations, and, however small, they were given in good faith, and free from fraud, and will support the contract. Appellant got all he bargained for, and should not be heard to complain of the inadequacy of the consideration. He was in position at the time he signed the contract to know all that he learned later on, and, if he chose to purchase rather than fight for peace, he must abide the consequences of his own deliberate act. We find no error, and therefore recommend that the judgment and order be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## WALSH v. HYLAND, Judge.

S. F. No. 1396; August 16, 1898.

54 Pac. 148.

**Mortgage Foreclosure—Judgment of Reversal—Construction.**—A judgment of the supreme court reversing a judgment in a mortgage foreclosure for $1,200 and costs and attorney's fees, and directing a judgment for the principal and interest stipulated in a note, less interest paid—defendant to have costs of appeal—does not deny plaintiff the counsel fees and costs of the trial court, no question of such counsel fees or costs being considered on the appeal.

APPEAL from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Petition by Margaret E. Walsh for a writ of mandamus to M. H. Hyland, judge of the superior court of the county of Santa Clara. Granted.

John H. Yoell for petitioner; Wm. P. Veuve for respondent.

HENSHAW, J.—This is a petition for an original writ of mandate. It arises upon the following facts: Upon appeal to this court in the case of Walsh v. Hunt, 120 Cal. 46, 39 L. R. A. 697, 52 Pac. 115, the judgment of the trial court was reversed, with directions to that court to enter a different judgment upon the findings, all of which will be found set forth in the opinion rendered in that case. Upon the going down of the remittitur, plaintiff in that action, who is petitioner herein, made application to the trial court to enter its judgment in her favor for the sum of $500, for $100 counsel fees, and for $60.15 costs in the trial court, with interest upon these sums, together with her costs upon the appeal to this court. The item of counsel fees was stipulated in the mortgage, and the amount had been awarded in the former judgment. The costs which were prayed for were the costs which were incidental to the former trial, and were also embraced within the judgment appealed from. The trial judge refused to grant the application. By his interpretation of the decision of this court, the only judgment permissible to be entered in plaintiff's favor was a judgment for $500, principal of the mortgage debt, with interest and costs upon the appeal to this court; thus holding that by the judgment of this court respondent upon that appeal was denied counsel fees and costs in the trial court. This construction of our judgment is erroneous. No question upon counsel fees or costs was considered upon the appeal. The sole modification of the judgment was that elaborately considered. The judgment by this court entered was, in substance and effect, a direction to reduce the principal sum of the mortgage debt from $1,200, the amount found due by the trial court, to $500, the amount which this court decreed was chargeable against the defendant. In all other respects the original judgment was to stand unmodified. For this reason

the mandate applied for should be issued, and it is ordered accordingly.

We concur: Beatty, C. J.; Temple, J.; McFarland, J.; Harrison, J.; Van Fleet, J.

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## MORE v. MILLER et al.*

S. F. No. 897; August 19, 1898.

54 Pac. 263.

**Appeal—Prematurity.—An Appeal from a Final Judgment before its entry is premature, inasmuch as the time within which such appeal may be taken does not begin to run until the entry.**

On petition for rehearing. Modified.

PER CURIAM.—In this case appellants took the view that they were entitled to appeal from the order denying a motion for leave to intervene within one year after the entry of final judgment in the action. In the opinion heretofore rendered in this case, the appeal was dismissed, upon the ground that the order striking out the intervention was a final judgment, and an appeal should be taken from it as from a final judgment. It was further said that the appeal here in question was taken more than thirteen months after final judgment denying leave to intervene was made and given. Upon petition for a rehearing, this court's attention is directed to the fact that the judgment striking out the intervention and denying leave to intervene has not been entered as a final judgment. An appeal taken from a final judgment before entry is premature, and the time within which an appeal may be taken from a final judgment does not begin to run until entry of the judgment. Under these circumstances, and for this reason, the judgment rendered in this case is modified, and the appeal is hereby dismissed, upon the sole ground that it has been prematurely taken.

*For former opinion, see ante, p. 78, 53 Pac. 1077.

## KENNEY v. PARKS et al.*

L. A. No. 405; September 6, 1898.

54 Pac. 251.

**Reformation of Deed—Parties.**—The Attorney Who is Alleged to have committed the fraud of making a deed conveying only a life estate, instead of a fee, is not a necessary party to an action to reform it.

**Reformation of Deed—Parties.**—The Executors in Possession of the Property of deceased, as well as the legatees and devisees claiming it under his will, are properly parties to an action to reform his deed to make it convey a fee, instead of a life estate.

**Reformation of Deed—Pleading.**—There is No Ambiguity Prejudicial to defendants in a complaint to reform a deed so as to convey a fee, instead of a life estate, in that in one place a mutual mistake is alleged, as though both parties were misled by the reading of the deed by the attorney, while in another place it is charged that the attorney and grantor, knowing that the grantee believed the deed to convey a fee, did not disclose the fact that it did not.

**Deeds of Husband and Wife to Take Effect After Death.**—Deeds executed by husband and wife, conveying each to the other their separate properties, and delivered to a third person, with direction to record that of the person dying first, are not testamentary or revocable.[1]

APPEAL from Superior Court, Santa Barbara County; W. B. Cope, Judge.

Action by Sarah J. Kenney against W. S. Parks and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Boyce, Taggart & Kellogg for appellants; B. F. Thomas for respondent.

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*For subsequent opinion in bank, see 125 Cal. 146, 57 Pac. 772.

[1] Cited with approval in Hieston v. Craig, 167 Ind. 112, 119 Am. St. Rep. 475, 77 N. E. 808, where the parties sought each to establish a separate instrument as the will of the decedent, one of these instruments being, in form, a contract and the other more in the familiar form of a will. The court said that "the animus testandi does not depend upon the maker's realization that the instrument he is executing is a will, but upon his intention to create a revocable disposition of his property to take effect after his death."

Cited in the note in 5 Cof. Prob. Dec. 11, 20, 22, on what constitutes a testamentary writing.

HAYNES, C.—Action to reform a deed, to quiet title, and for other relief. The plaintiff had judgment, and the defendants appeal upon the judgment-roll. The defendants W. S. Parks and J. C. Kenney are the executors of the will of Joseph A. Kenney, deceased, and the other defendants are heirs at law of said decedent, and devisees under said will. A jury was called, to whom certain special issues were submitted, and the findings of the jury thereon were adopted by the court, who added other findings covering all the issues, and ordered judgment thereon for the plaintiff, which was duly entered. Joseph A. Kenney, deceased, and the plaintiff, were husband and wife, and resided in the county of Santa Barbara, where each owned a considerable quantity of both real and personal property. The complaint alleges that in May, 1892, the plaintiff being then of the age of forty-eight years, and said Joseph A. then of the age of seventy-three years, and there being no living children of their said marriage, mutually agreed to execute deeds each to the other conveying absolutely in fee simple all of their respective estates, both real and personal, situate in said county, and agreed that said deeds should be placed as escrows in the hands of the cashier of the First National Bank in Santa Barbara, with directions to said cashier that, if the plaintiff should die during the lifetime of said Joseph A. Kenney, he, the said cashier, should, on request of said Joseph A., or his agent, file the deed of the plaintiff to said Joseph A. for record in the county recorder's office of said county, and, if said Joseph A. should die during the lifetime of the plaintiff, said cashier should, at the request of plaintiff or her agent, file said deed of Joseph A. to her in said recorder's office; that, pursuant to said agreement, said Joseph A. employed one S. W. Bouton, an attorney, to prepare said deeds. They were prepared, and were each duly executed and acknowledged on June 1, 1892. Both deeds are set out in full in the complaint. The deed executed by Joseph A. to the plaintiff is as follows:

"For and in consideration of my love and affection for my wife, Sarah J. Kenney, I, Joseph A. Kenney, of the county of Santa Barbara, in the state of California, do hereby grant, bargain, and sell unto my said wife, Sarah J. Kenney, to have and to hold the same during the term of her natural life, with remainder in fee to my lawful heirs according to

the laws of the state of California, all that real property situated in the county of Santa Barbara, state of California, bounded and described as follows, viz.: All my real property, and all interests therein belonging to me, situate in the said county of Santa Barbara; also all my personal property, of whatsoever kind and description, moneys, notes, bonds, and all other evidences of debt belonging to me; and this deed shall be an assignment to said grantee of all mortgages and other securities owned by me. This deed is intended to convey all my estate situate in said Santa Barbara county in the event of my decease during the lifetime of my said wife, and is to be deposited in escrow with the cashier of the First National Bank of Santa Barbara to be filed for record by him in case of my decease as aforesaid; and I do hereby declare, as part of this conveyance and my act and deed, that the filing this deed for record by said cashier shall constitute and be a good and sufficient delivery of this deed to the grantee therein named.

"Witness my hand and seal, this first day of June, A. D. 1892.

"[Seal] JOSEPH A. KENNEY.

"Signed, sealed, and delivered in presence of

"S. W. BOUTON."

The deed executed by the plaintiff to her husband was in all respects the same, except that it purported to convey a fee simple absolute, instead of a life estate. These deeds were each inclosed in a separate sealed envelope; and upon that inclosing the deed of the husband was the following indorsement:

"The inclosed deed, dated the first day of June, 1892, is herewith deposited in escrow with the cashier of the First National Bank of Santa Barbara, and the said cashier who may be such cashier at my decease, if I should die during the lifetime of my wife, is hereby instructed and commanded at my decease, on request of my said wife, or her agent, to open this envelope at once, and to file the inclosed deed for record with the recorder of Santa Barbara county.

"Santa Barbara, Cal., June first, 1892.

"JOSEPH A. KENNEY.

"In the presence of

"S. W. BOUTON."

The envelope inclosing the deed executed by the plaintiff bore the like indorsement.

Joseph A. Kenney died testate, July 5, 1894; and on July 13, 1894, plaintiff demanded of said cashier that he deliver the said deed executed by Joseph A. to her, or place the same on record at her expense; but he declined to do either, but delivered to her the deed she had executed. The amended complaint was demurred to upon several grounds.

1. It is claimed that there is a defect of parties defendant, in that S. W. Bouton, who is alleged to be the party who committed the fraud, is not made a defendant. He is not interested in the subject of the action, and no judgment could have been rendered for or against him, and therefore could not have been a proper party.

2. There was no misjoinder of parties defendant. The executors of the will, who were in possession of the property, were properly joined with the heirs and the legatees and devisees under the will who claimed to be entitled to the property.

3. Another ground of demurrer is that the complaint is ambiguous and uncertain in its attempted statement of a cause of action to reform said deed. This ground of demurrer refers to the allegations concerning the insertion of a clause in the deed of the husband limiting the estate conveyed to the plaintiff to an estate for life, instead of an estate in fee, as they had agreed, and plaintiff did not discover that said deed contained said clause until April, 1895, which was nearly a year after her husband's death. It is alleged that the deeds were read to plaintiff and her husband by Bouton, and that in the reading of the deed executed by her husband said clause was omitted; that, at the time of preparing said deeds, she had the utmost confidence both in her husband and Bouton, and this was known to her husband, who also knew that she was unable to read said deeds, and believed that her husband's deed conformed to their agreement, and conveyed to her an absolute title in fee simple, and that otherwise she would not have executed her said deed. This is, in substance, the allegation of the complaint upon which the reformation of the deed was prayed for, and was all that was essential to be alleged. It is true, the complaint alleged a mutual mistake in the execution of said deed, as it would be if both parties were misled by the reading of the deeds, and Bouton is thereby, in effect, charged with a fraud upon both, though in

another paragraph it is charged, in substance, that Bouton and Joseph A. Kenney, knowing that plaintiff believed the said deeds were alike, did not disclose the fact that they were not. Whether the fraud was perpetrated solely by Bouton, by which both parties to the deed were misled and deceived, or whether Bouton and the husband both participated in it, could make no difference as to the relief to which the plaintiff is entitled, for in either case she was misled, deceived and defrauded. I see no ambiguity or uncertainty which could mislead or prejudice defendants.

The general demurrer is not specially presented in appellants' brief. It was doubtless based upon the conclusion of counsel that the facts stated showed the instrument in question to be of a testamentary character, and which could not for that reason operate as a deed of conveyance—a question here raised upon the findings, which, it is claimed, do not support the judgment. That it was not intended that the grantee should enter upon the enjoyment of the property described in the deed until the death of the grantor is clear; but, if a future interest was presently and irrevocably given, then it is equally clear that it was valid as a conveyance; and whether it was or not must be determined from the deeds, the instructions to the depositary, and the acts and intentions of the parties. The complaint alleges and the court found that these deeds were made and deposited with the cashier in pursuance of the agreement made between the plaintiff and her husband in reference to the property of each. The consideration for the promise of each to make and deposit the deed was the promise of the other, and, when the deeds were made and deposited in compliance with the terms of that agreement the agreement itself was executed, and could not be annulled except by mutual consent. The deeds, as well as the indorsements made upon the envelopes, call the deposit of the deeds with the cashier of the bank an escrow. Under many authorities, the cashier became a trustee, and not a simple depositary of an escrow, though in either case the deposit was not revocable. It was so held, as to an escrow, in McDonald v. Huff, 77 Cal. 279, 19 Pac. 499. The distinction is that, where the instrument is deposited to await the performance of some condition by the grantee, it is an escrow; while, if it is simply to await the lapse of time or the happening of some contingency, it will be deemed the

grantor's deed presently: Foster v. Mansfield, 3 Met. (Mass.) 415, 37 Am. Dec. 154. So, in Wheelright v. Wheelright, 2 Mass. 452, 3 Am. Dec. 66 (margin): "If a grantor deliver any writing as his deed to a third party, to be delivered over by him to the grantee on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee; and, if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by a plea of non est factum, whether generally or specially pleaded." But, without multiplying cases from other jurisdictions, I think the case of Bury v. v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338, is conclusive of this case. In that case, Hinkson, being ill, sent for his attorney, to advise as to the disposition of his property, and, acting upon the advice of his attorney, signed and acknowledged a deed purporting to convey his real estate to his two daughters, and gave the deed to his attorney, with instructions not to record it, but to deliver it to the grantees upon his death. He recovered from his illness, and demanded possession of his deed from his attorney, who refused to surrender it. At a later date he made a will devising all his real estate to one of said daughters, and afterward died, and the attorney delivered the deed to the other daughter, the plaintiff in that action. Upon appeal, Mr. Justice Garoutte, speaking for the court, after quoting from many authorities, said (page 451, 98 Cal., and page 340, 33 Pac.): "Section 767 of the Civil Code provides that a freehold may commence in futuro, and for that reason we are inclined to recognize the views of Dixon, C. J., in Prutsman v. Baker, 30 Wis. 650, 11 Am. Rep. 592, as the true rule applicable to this class of cases in this state. We know of nothing in the codes forbidding the doctrine announced in that case, to wit, that the grantor, upon the irrevocable delivery of the deed to the depositary, thereupon constitutes such depositary the trustee of the grantee, and creates in himself a tenancy for life." The case of Bury v. Young, supra, is cited and followed in Wittenbrock v. Cass, 110 Cal. 1, 6, 42 Pac. 300, and in Ruiz v. Dow, 113 Cal. 496, 45 Pac. 867. That the delivery of these deeds to the cashier was an irrevocable transaction follows not only from the fact that it was done in pursuance of a mutual agreement between the plaintiff and her husband, but from the declarations in the body of the instruments and

the express and unqualified direction to the cashier indorsed upon the envelopes; and this irrevocability constitutes the distinguishing characteristic between a grant and a testamentary disposition, which is always revocable and passes no present interest; or, as stated in Habergham v. Vincent, 2 Ves. Jr. 231, the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death, and passing no present interest. The making of a will long after he had executed and delivered the deed to the plaintiff could have no effect upon it.

Appellant attempts to distinguish this case from Ruiz v. Dow, 113 Cal. 494, 495, 45 Pac. 867, because the deed in that case declared that the filing for record after the death of the grantor should be a good delivery of the deed, "as of the date of the execution thereof." But the legal effect of the delivery of that deed to the bank, under the circumstances, would have been the same if the words above quoted had been omitted; and therefore those words served only as the expression of an intention which would have been inferred without them. The question here involved having been expressly adjudicated in this court, a review of the many cases cited by appellant is unnecessary, many of which expressly support our conclusions, while none that we have examined conflict therewith. We advise that the judgment appealed from be affirmed.

We concur: Chipman, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

## KERRY v. PACIFIC MARINE SUPPLY CO.*

S. F. No. 818; August 26, 1898.

54 Pac. 262.

**Damages—Appeal—Modification.—Finding of Damages in Excess** of amount averred in complaint established damages to amount claimed, so that judgment for the excessive amount need not be reversed, but merely modified.

PER CURIAM.—Upon further consideration, we are of opinion that a reversal of the judgment in this case is not necessary, and that a modification will meet the ends of justice. The finding of damage is for an amount greater than the complaint avers. Still, the finding necessarily establishes that plaintiff was damaged to the amount which he claims. The judgment may, therefore, be modified, and it will still be supported by the finding in question. All other propositions having been resolved in favor of plaintiff and respondent, it would be a hardship to compel a new trial, if that result could properly be avoided. We think this may be done, for the reasons indicated, which reasons find support in many cases: Fischer v. Blank, 138 N. Y. 669, 34 N. E. 397; Cox v. Railway Co., 77 Iowa, 478, 42 N. W. 429; Miller v. Wilkins, 79 Ga. 675, 4 S. E. 261; Frankhouser v. Cannon, 50 Kan. 621, 32 Pac. 379; Winter v. Fulstone, 20 Nev. 260, 21 Pac. 201, 687. The two final sentences of the opinion are therefore eliminated. The judgment of reversal is vacated. The court below is directed to modify its judgment by reducing the same in the sum of $239, or one-half of one cent per lineal foot for all of the piles. It is further ordered that appellant have his costs upon this appeal.

*For former opinion, see 121 Cal. 564, 54 Pac. 89.

## J. M. GRIFFITH CO. v. CITY OF LOS ANGELES.

L. A. No. 390; September 3, 1898.

54 Pac. 383.

**Sewer Contract—Extras.—A Contract With a City for Constructing** a sewer provided that the city should withhold a certain sum from the contract price for six months after the completion of the work, to make any repairs necessary, and at the end of such period should pay the contractors said sum, or so much thereof as had not been paid, for the repairs. Part of said sum was expended for repairs, made before the expiration of the six months, and the additional expenditures for repairs within the succeeding two months exceeded the sum retained. The city began the work of repairs well within the six months, and the good faith of its acts was in no way questioned. Held, that the contractor could not recover the balance in excess of the cost of repairs expended at the end of the six months, within the rule that particular clauses of a contract are subordinate to its general intent: Civ. Code, sec. 1650.[1]

**Sewer Contract—Extras.—A Contract With a City for Constructing** a sewer provided that no extras were to be allowed, except in case of a change in the route or appliances, and then only when the valuation of the changes should be agreed on between the parties, and indorsed on the contract, or, if unable to agree, when the valuation fixed by the city engineer should be indorsed on the contract. On the request of the city engineer, steel bands were used for the pipe, which constituted a change in the contract. The city council had no knowledge of the change until after the pipe was laid, and no indorsement respecting the bands or the price was made on the contract. The contract did not give the city engineer authority to act for the city in making the agreement. Statutes of 1889, page 506, provides that the city shall not be liable on a contract, unless in writing, and by order of the council. Held, that the contractor could not recover the value of the bands.

**Sewer Contract—Extras.—The City was not Impliedly Liable** as on a quantum meruit, since it had no opportunity to elect whether or not to accept the sewer with the bands, it being imbedded below the surface of the earth at the time payment for the extras was demanded.

APPEAL from Superior Court, Los Angeles County; Waldo M. York, Judge.

[1] Cited with approval in Gray v. Societe Francaise etc., 131 Cal. 570, 63 Pac. 850, where the court holds that when the contract calls for a resort to arbitration in case of a dispute as to extras, the same is a condition precedent to the bringing of a suit.

Action by the J. M. Griffith Company against the city of Los Angeles to recover the balance due under a sewer contract. From a judgment for plaintiff for only part of the money sued for it appeals. Affirmed.

C. K. Holloway and J. S. Chapman for appellant; W. E. Dunn for respondent.

BRITT, C.—On April 24, 1893, the city of Los Angeles, defendant here, and certain persons, who may be called the "contractors," executed several instruments in writing, which for present purposes we may regard as a single contract, whereby the contractors agreed to construct (at their own cost for labor and material) sections 3 and 6a of an outfall sewer leading from said city to the Pacific Ocean, for which construction the city agreed to pay them the aggregate sum of $77,450. Said contractors constructed said sections of sewer, and received most of the compensation provided in the contract. They assigned to the plaintiff, a corporation, their claims against the city for some unpaid balances, and for the value of certain alleged extra materials used by them in the work aforesaid. This is an action on the claims so assigned. Plaintiff had judgment below for some hundreds of dollars, but failed as to the bulk of its demand.

1. By the terms of the said contract the conduit in said sections of sewer was to be a pipe constructed of redwood staves bound with steel bands, and it was provided that the city might retain ten per cent of the price specified in said contract for the space of six months after the completion of the work and its acceptance by the city, "during which time the contractors are obliged to keep the pipe in repair," and that in case of their default in that particular the city should make the repairs, using so much of the sum retained as might be necessary for that purpose. On February 23, 1894, the city and said contractors made a further agreement in writing, reciting that said sections 3 and 6a of the sewer were completed and ready for acceptance by the city, and providing that in lieu of retaining ten per cent of the contract price for application to repairs after acceptance, as allowed in the prior contract of April 24, 1893, the city should withhold the sum of $5,000, and that if at any time during such period of six months after acceptance of said sections any repairs

should, in the opinion of the city council, become necessary on said sections, or either of them, the council might at once make the same, and deduct the cost thereof from said sum of $5,000; also, "that at the expiration of six months the city shall pay the said contractors the said sum of $5,000, or so much thereof as has not been paid for the purposes above mentioned." The city retained said sum, and has never paid the same to said contractors, or to the plaintiff, their assignee. The court found that the city expended for repairs on said sections of the sewer to August 23, 1894, inclusive, the sum of $1,894.35, and prior to October 7, 1894, its expenditure in that behalf exceeded $5,000; also, that work on such repairs was begun by the city on July 10, 1894, and continued until February 20, 1895. Plaintiff contends that it should recover the sum of $3,105.65, which is the excess of the amount retained by the city above the payments made for repairs up to August 23, 1894; plaintiff claiming this date to mark the end of the period of six months, during which the city could rightfully expend for repairs any part of said sum of $5,000 withheld as aforesaid. This contention is founded mainly on the clause of the instrument of February 23, 1894, that "at the expiration of six months the city shall pay to the contractors the said sum of $5,000, or so much thereof as has not been used for the purposes above mentioned." Particular clauses of a contract are subordinate to its general intent (Civ. Code, sec. 1650), and the contracts before us afford a clear case for the application of the principle. The plain object of said instrument of February 23, 1894, understood in connection with the cognate provisions (which it modified) in the contract of April, 1893, was to indemnify the city, to the amount of $5,000, for the cost of repairing defects which might be disclosed in sections 3 and 6a of the sewer during six months next following acceptance thereof by the city, and which the city should at once proceed to make good. The city began the work of repairs well within the period of six months. The continued prosecution thereof involved a cost exceeding the sum retained by it under the several contracts. The good faith of its conduct is in nowise impugned. We think, therefore, that the general intent of the indemnifying provisions of the contracts ought not to be overridden by the particular clause that at the expiration of six months the city should pay to the contractors so much of the sum withheld "as

has not been used for the purposes above mentioned." On the theory urged by plaintiff, if the whole line of pipe had collapsed on the last day of the six months during which the city was allowed to repair at the contractors' expense, the city would still have been obliged to pay over the indemnifying fund, unless it could on that day actually expend it in replacing the ruin. We conclude that the judgment denying plaintiff's claim to any part of said sum of $5,000 was right.

2. Said contract of April 24, 1893, contained the following: "The amount herein agreed to be paid for said work is in full for said sections of sewer complete. No extras are to be allowed, except in case of a change in route or plans, and in that case the payment of the same shall be as stated in the specifications hereto attached." In the specifications referred to it was provided that: "The city engineer reserves the right to make any desired change in the plans, but the changes so made, with the price to be added to or deducted from the contract price, shall be agreed upon between the parties hereto and indorsed upon the contract; and, if they shall be unable to agree upon a price for such alterations, then the city engineer shall fix a fair and reasonable valuation upon such work, and this valuation shall be indorsed upon the contract, and when so indorsed shall be binding upon the parties thereto. If not so indorsed, then the original price shall be neither increased nor diminished." On the request of the city engineer, who had direction of the work, the contractors used in the construction of said sections of sewer a large number of steel bands for the pipe, in addition to those required by the specifications. It may be admitted, without deciding, that such action of the engineer was a change of plans, so far as his authority in that behalf extended. It does not appear that the city council had any information of the use or intention to use the additional bands until after said sections of sewer were completed, when the contractors presented an account against the city for the same as extras, at the rate of eighty-five cents each, amounting to $4,012. The city engineer certified that seventy cents each was a just price for them. No indorsement respecting such bands or the price was made on the contract. The court found that they were worth $3,304, the value certified by the engineer. Plaintiff claims that it

should have had judgment therefor. Occasion for said additional material seems to have arisen through no fault of the contractors. The contract, however, was plain that no extras should be allowed except on change of route or plans, and, in case the engineer should change the plans, still no extra payment was provided for, unless the changes so made, with the price to be added to or deducted from the contract price, "shall be agreed upon between the parties hereto," viz., the city and the contractors. If they could not agree on the price, then the engineer should fix the same. These provisions evidently mean that no changes of plan should become a part of the contract, to be paid for by the city, unless it should agree thereto. The contract does not purport to clothe the engineer with authority to agree for the city. The city charter (section 207) provides "that the city of Los Angeles shall not be bound by any contract, or in any way liable thereon, unless the same is made in writing, by order of the council," etc.: Stats. 1889, p. 506. The course pursued by the engineer and the contractors, however just may have been their intentions in fact, ignored any right of the city to determine either the extent or the price of changes in the work then under contract. If it could be effectual to charge the city against its will for the additional bands, then it is not perceived that the contract afforded any protection whatever to the city against the indefinite expansion both of the plan and the cost of the sewer at the pleasure of the engineer and the contractors. In our opinion, the terms of the contract do not support plaintiff's claim for the value of said bands. Nor is the city impliedly liable as upon a quantum meruit. It never had opportunity to elect whether it would or would not accept the sewer with the double bands, if that circumstance be material. When the contractors demanded payment for the bands, they had already received far the greater part of the contract price, and the sewer was imbedded below the surface of the earth, in the right of way provided by the city for its reception. Moreover, as we understand the charter of the city (section 207, above referred to), no liability of that amount can be incurred by the city except in virtue of its written contract: See Zottman v. City and County of San Francisco, 20 Cal. 96, 107, 81 Am. Dec. 96; Santa Cruz etc. Pavement Co. v. Broderick, 113 Cal. 628,

45 Pac. 863; McDonald v. Mayor etc., 68 N. Y. 23, 23 Am. Rep. 144. The judgment should be affirmed.

I concur: Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## MAXSON et al. v. SUPERIOR COURT OF MADERA COUNTY.

L. A. No. 382; September 15, 1898.

54 Pac. 520.

**Justices of Peace.—On Appeal from a Default Judgment of a** justice of the peace, whether on questions of law or of law and fact, there cannot be a trial de novo.

**Justice of Peace.—On Appeal from a Justice Court,** the superior court has no jurisdiction, on reversing, to remand the case to the justice, the effect of an order vacating a justice's judgment being to dismiss the action without prejudice.

Petition by B. A. Maxson and another for a writ of review to review a judgment of the superior court of Madera county entered in an action appealed to that court from a justice court. Judgment annulled in part.

W. H. Larew for petitioner; Francis A. Fee for respondent.

CHIPMAN, C.—An action was commenced in the justice's court by one Roberts against Maxson & Harris, petitioners in this proceeding. Defendants in that action appeared by general demurrer. A day was fixed for hearing the issue of law raised by the demurrer, and defendants duly notified. They failed to appear, and after waiting one hour the demurrer was overruled. Plaintiff thereupon demanded judgment for the sum specified in the summons, and the court entered judgment as prayed for in the complaint, after first entering the default of defendants. In due time defendants gave notice of and perfected their appeal from the judgment "on questions of law alone." Defendants filed a statement of the case setting forth the facts as above, and stating the

grounds for the appeal, namely, that the complaint does not state facts sufficient to constitute a cause of action; that defendants had no notice of the overruling of the demurrer, nor of the trial of the case, other than the notice of the trial of the issue of law raised by said demurrer; that the justice had no jurisdiction to enter a judgment, and it is void. When the appeal came up for hearing, the superior court ordered "that the judgment of the lower court be, and the same is hereby, reversed, with directions to the said lower court to sustain the demurrer of the defendants to the complaint of plaintiff, with leave to the said plaintiff to amend his complaint, if so advised." To which ruling ordering any further proceedings in the lower court after the judgment was reversed defendants excepted.

The justice had jurisdiction to enter judgment upon failure of defendants to answer. They were not entitled to previous notice of the overruling of the demurrer: Code Civ. Proc., sec. 872; Stewart v. Justice's Court, 109 Cal. 616, 42 Pac. 158. The question as to the sufficiency of the complaint was presented by the statement of the case, and could have been heard without a statement: Rossi v. Superior Court, 114 Cal. 374, 46 Pac. 177. The court had jurisdiction to hear and determine it: Code Civ. Proc., sec. 980. But whether the complaint did or did not state a cause of action cannot be reviewed in this proceeding: Sherer v. Superior Court, 94 Cal. 354, 29 Pac. 716; 96 Cal. 653, 31 Pac. 565. The superior court, however, did not sustain the demurrer, but manifestly grounded its order remanding the case to the justice upon the insufficiency of the complaint.

Petitioners contend (1) that there is no distinction between appeals on questions of law alone and appeals on questions of law and fact, and that the court ought to have ordered a new trial in the superior court; and (2) that the court had no jurisdiction to correct the rulings of the justice, and remand the case with instructions how to proceed. Respondent contends (1) that the appellate court has jurisdiction to try only such issues as were raised in the lower court, and that as no issue of fact was there raised the superior court could not try the case anew; and (2) that, having no authority to try the case, the superior court made the only order it could make, when it reversed the judgment, and remanded the case to the court of original jurisdiction.

The effect of an appeal from a justice's court is to set aside and vacate the judgment in that court, and only the superior court thereafter has jurisdiction: Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193. And this is true, whether the appeal be on questions of law alone or of both law and fact. The appeal here was not from the order overruling the demurrer, as suggested by respondent, but was, and necessarily must have been, from the final judgment, and brought up all the proceedings of the justice. And that an appeal may be taken from a default judgment there can be no doubt: Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. 481.

1. It is the settled law in this state that on appeal from a judgment properly entered in the justice's court by default to answer, there being no issue of fact raised in the justice's court, the appellate court cannot try the case de novo; and this is true whether the appeal is upon questions of law alone, or on questions of both law and fact: People v. County Court, 10 Cal. 19; Funkenstein v. Elgutter, 11 Cal. 328; Rickey v. Superior Court, 59 Cal. 661; Southern Pac. R. Co. v. Superior Court, 59 Cal. 471; Curtis v. Superior Court, 63 Cal. 435; Myrick v. Superior Court, 68 Cal. 98, 8 Pac. 648; Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. 481; Code Civ. Proc., sec. 980. In Curtis v. Superior Court, supra, defendant had answered, denying all the allegations of the complaint, but failed to appear at the trial. The appeal was on questions of law alone, and the superior court reversed the judgment, and ordered a new trial in that court. Held proper. But in the case here there was no answer and no issue of fact presented in the lower court.

2. If the appellate court cannot in such case order a new trial, what can it do? Respondent cites Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8, from which he quotes as follows: "When an appeal from a justice's court is regularly taken, the superior court not only has jurisdiction to try the case upon its merits, but it has entire and complete jurisdiction of the cause for any and all purposes." And it is hence claimed that the action of the superior court in the present case cannot be reviewed, because it had jurisdiction to make the order. That case has been often cited to the well-settled proposition that, however grave the error committed by the court, its judgment cannot be annulled by means of the writ

of certiorari, if it had jurisdiction. But we do not think it was intended to hold that by merely assuming jurisdiction the court could acquire it, nor that, by perfecting an appeal from a justice's court to the superior court in a case where the record showed a default judgment in the lower court, the superior court could order a new trial in that court, and try the case de novo, or remand it to the lower court for trial. In Buckley v. Superior Court the appeal was dismissed on motion. It was held that the court had jurisdiction to do this, and its action could not be reviewed, however erroneous. If the court had jurisdiction in the present case to remand it with directions to the justice how to proceed, then Buckley v. Superior Court is undoubted authority, and we cannot review the error, if it was error only. But to hold that the court had such jurisdiction would be to ingraft upon our practice in justice courts a system unknown to the statutes, and would recognize a power never before exercised in this state in any reported case of which we have knowledge. It would practically inaugurate the system governing appeals to the supreme court, with all its complexity, to carry out which the law provides no machinery, and points out no procedure. The cases all treat an appeal duly perfected from the justice's court as finally and forever removing the case from that court, and vesting jurisdiction thereafter in the appellate court. In Myrick v. Superior Court, 68 Cal. 100, 8 Pac. 649, Commissioner Foote remarked: "The superior court should have reversed that judgment, and sent the case back for trial on the issues tendered by the pleadings." This expression is seized upon by respondent as authority for the order of the court in the present case remanding it to the justice with directions. In Myrick v. Superior Court there was a change of venue obtained, and defendant moved to dismiss, before the justice to whom the case was transferred, on the ground that the justice before whom the action was originally brought failed to mark the complaint "Filed," as required by law; and, although the defendant had answered and demurred, the motion was granted. Plaintiff duly appealed on "law and facts," and the superior court tried the case de novo, and gave judgment for plaintiff. It was here held, on writ of review, that the court had no power to try the issue of fact, because no such issue had been tried in the lower court, and that the action of the superior court was

beyond its jurisdiction, and its judgment void, and it was ordered annulled. The suggestion of the commissioner that the case ought to have been sent back to the justice for trial was not necessary to the decision, and was not carried out in the order made by this court. That case decided but the one point, to wit, that, there having been no issue of fact tried in the lower court, no such issue could be tried in the superior court; and it is cited to that proposition in Fabretti v. Superior Court, supra. We have found in no case touching the practice in justices' courts, and appeals relating thereto, any intimation that the course suggested in Myrick v. Superior Court could be resorted to in a case like the present one; and it is because the superior court lacks jurisdiction to make such an order. It was said in Sherer v. Superior Court, supra: "The superior court can acquire appellate jurisdiction of a cause pending in a justice's court only in conformity with the steps prescribed by the statute for taking an appeal from that court; nor can it, after such appeal has been taken, exercise any other jurisdiction in the cause than has been authorized by statute." And it is only within the limits thus prescribed that the exercise of its jurisdiction, as the opinion aptly adds, "must be submitted to as a part of the sacrifice which every individual is compelled to yield to the infirmities of human government." In the case of Southern Pac. R. Co. v. Superior Court, supra, at the suit of Wells against the Southern Pacific Railroad Company, defendant was served with summons, but not with copy of the complaint. Defendant appeared specially by motion to set aside the service. The motion was granted, and judgment entered against plaintiff, who appealed. In the superior court defendant appeared specially to move the dismissal of the appeal. The court, without disposing of the appeal, ordered the defendant to answer and proceed to trial. It was held in this court, on application for writ of prohibition, that the superior court had jurisdiction only to affirm or reverse the justice's judgment, and that the order to try the case was in excess of the jurisdiction of the superior court. Our conclusion upon the point is that the court exceeded its jurisdiction in remanding the case to the justice's court. It had jurisdiction to annul and vacate the judgment. It had not jurisdiction to try the case de novo, nor to remand the case to the lower court. The effect of the order vacating the

judgment of the justice of the peace was to dismiss the case, leaving the plaintiff the right to begin another action in the justice court. This may seem a hardship, and it is; in some cases amounting to a denial of any remedy—for example, where the statute of limitations has intervened. But plaintiff took judgment with the admonition that, if his complaint was insufficient, the superstructure built upon it might be torn down on appeal. So much of the judgment here upon review as directs the justice's court to sustain the demurrer or to take any further proceedings in the case is annulled.

We concur: Britt, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion so much of the judgment as directs the justice's court to sustain the demurrer or to take any further proceedings in the case is annulled.

## STANTON v. SINGLETON et al.

L. A. No. 406; September 23, 1898.

54 Pac. 587.

**Mining Contract—Parties and Signing.—Where a Contract Granting** an option to purchase a mine was signed by two of three co-owners, and an action to enforce it was brought against the signers, the burden was on them to show, as claimed, that the contract was not to be operative unless signed also by the other owner, who was named therein.

**Mining Contract—Delivery.—An Allegation That Defendants** "made and entered into" the agreement sufficiently imports delivery as against a general demurrer, in an action for specific performance.

**Mining Contract—Mutuality.—A Contract Whereby Plaintiff was Given** an option to purchase an interest in a mine for a certain price on performing certain conditions is not void for want of mutuality, so that it cannot be specifically enforced, where plaintiff notified the other parties thereto of his election to perform his part thereof.[1]

[1] Cited in Hoogendorn v. Daniel, 178 Fed. 768, 102 C. C. A. 213, with other authorities, to support the proposition that, the terms of an option having been once accepted by the holder of it, the parties are bound mutually, and either may exact specific performance of the other.

**Specific Performance—Tender.**—Under Civil Code, section 1440, allowing a party to an obligation which the other party repudiates before a default has occurred to enforce the obligation without performing or offering to perform the conditions in favor of the other, the refusal to allow a party to an option contract to perform the conditions of it, together with a repudiation of the contract prior to the expiration of the option, releases the holder of the option from tendering the price to be paid under it prior to suing for specific performance.

**Specific Performance—Parties.**—A Mine Owner Who Did not Sign an option contract executed by his two co-owners is not a necessary party to an action to enforce the contract, where there is nothing to show that he is not willing to carry out the agreement, and no relief is sought against him.

APPEAL from Superior Court, Kern County; Walter Van Dyke, Judge.

Action by O. B. Stanton against John Singleton and others. From a judgment sustaining a demurrer to the complaint plaintiff appeals. Reversed.

Rothchild & Ach, J. W. Ahern, J. A. Haralson, and Lloyd & Wood for appellant; Reddy, Campbell & Metson for respondents.

HARRISON, J.—The plaintiff seeks by this action to compel a performance by the defendants of the following contract, which he alleges was made and entered into between him and them on the twenty-second day of June, 1895:

"Agreement made and entered into this 22nd day of June, 1895, between John Singleton, F. M. Mooers, and C. A. Burcham, of Kern county, state of California, parties of the first part, and O. B. Stanton, of Bakersfield, state of California, party of the second part: Whereas, the parties of the first part are owners by location of a certain mineral tract located in the Summit mining district, Kern county, California, and designated and described as follows [giving description], and, being desirous of obtaining capital to work the same, hereby agree with party of the second part that, for and in consideration of one dollar, in hand to them paid, the receipt of which is hereby acknowledged, agree to give party of the second part thirty days' option of a one-half interest of the above enumerated claims, now owned by them, in con-

sideration of the party of the second part agreeing to spend—First, ten thousand ($10,000) dollars in opening and developing said property; second, in erecting a ten-stamp quartz-mill, modern in every particular, the stamps to weigh not less than seven hundred pounds, or the equivalent, as may be found the most desirous to work the ores. . . . . The parties of the first part hereby agree that the party of the second part shall have the privilege any time within six months from the date of this instrument to purchase the aforesaid property for the sum of five hundred thousand ($500,000) dollars. The essence of this contract being time, it is mutually agreed that, should the party of the second part not commence active operations within thirty days, this contract shall be null and void. The party of the second part hereby agrees that, if he should fail to fully carry out this contract, all moneys paid or expended by him shall be forfeited, and the full properties returned to the parties of the first part."

This contract was signed by the defendants Singleton and Mooers, and by the plaintiff. It is alleged in the complaint that at the time of its execution the defendants represented to him that they were the owners of an undivided two-thirds interest in said mining claims, and that C. A. Burcham was the owner of the other undivided third interest, and that they had authority from Burcham to act for him in selling said claims, or to make any other contract for working and developing them. The plaintiff also alleges that immediately after the execution of the contract he notified the defendants that he elected to perform his part of said contract, and to thereby acquire the undivided half interest in said mining claims, and that the defendants placed him in possession of said mining claims for the purpose of performing his part of the contract, and that, under the belief that they had the right to act for Burcham, he proceeded to work and develop them, as required under the conditions of the contract, and for that purpose expended about $2,000 as a part performance of his portion of said contract; that on the ninth day of July, 1895, the defendants notified him that they would not be bound by the terms of the contract, and repudiated the same, and refused to permit him to continue the performance of labor on said property, or the expenditure of any more money thereon, and refused to permit him or his employees to enter upon said claims, or either of them, for the

purpose of performing his contract, and refused, and still refuse, to execute to him a deed of the one-half interest in said property. It is further alleged that the consideration expressed in the contract for the acquirement of said one-half interest is adequate and reasonable, and that on the day of the execution of said contract, and ever since, the plaintiff has been, and is now, ready, able and willing to perform all of the conditions on his part to be performed for the acquirement of said one-half interest. He therefore asks judgment that he be let into possession of said premises for the purpose of performing the labor and otherwise carrying out the provisions of said contract to be performed by him, and for general relief. The defendants demurred to this complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and also on the ground that Burcham should have been made a party defendant, and, their demurrer having been sustained, judgment was rendered dismissing the complaint, from which the plaintiff has appealed.

The point chiefly urged in support of the demurrer is that inasmuch as Burcham is named in the contract as a party thereto, and as one of the owners of the mining claims, and as he did not join in its execution, the contract is incomplete, and cannot be enforced against those who did sign it. Whether it was the intention of the parties who signed the contract that it should not be operative until it should be also signed by Burcham is a matter extraneous to the written instrument, and is to be shown by evidence outside of the instrument itself. Upon the face of the instrument, the contract on the part of the defendants is complete, and the burden is upon them to show that they were not to be bound by their execution of it until it was also executed by Burcham. There is nothing on its face to prevent it from being operative upon them without his signature, and it is consistent with its language to assume that such was their intention. Prima facie they are bound by its terms, and, if they would be relieved from this apparent obligation by reason of any facts or circumstances extrinsic to the instrument, they must allege such defense in their answer, and sustain it by evidence. Mr. Bishop, in his treatise on Contracts, says (section 348): "If by parol stipulation, or, a fortiori, if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it without such addi-

tion will not bind those who have signed; but, if nothing of this appears, the parties signing will be holden, though even on the face of it the signatures of others were contemplated by the draftsman." "It rests upon the party who has signed and delivered the instrument to establish that the delivery was intended to be in escrow": Chouteau v. Suydam, 21 N. Y. 179. See, also, Haskins v. Lombard, 16 Me. 140, 33 Am. Dec. 645; Parker v. Bradley, 2 Hill, 584; Dillon v. Anderson, 43 N. Y. 231; Cochran v. Blout, 161 U. S. 350, 40 L. Ed. 729, 16 Sup. Ct. Rep. 454; City of Los Angeles v. Mellus, 59 Cal. 444; Cavanaugh v. Casselman, 88 Cal. 543, 26 Pac. 515. The allegation in the complaint that the defendants represented to the plaintiff that they were authorized to act for Burcham in making the contract, which for the purpose of the demurrer must be taken as an admission of this fact, tends to refute the proposition that it was the intention of the parties that he should sign the contract before it should become operative. It does not appear that they did not in fact have such authority, or that he is unwilling to abide by its terms.

The allegation that the defendants "made and entered into" the agreement sufficiently imports a delivery: Russell v. Whipple, 2 Cow. 536; Peets v. Bratt, 6 Barb. 662; Smith v. Waite, 103 Cal. 372, 37 Pac. 232.

Under the terms of the contract, the plaintiff had the right to enter upon the mining claims for the purpose of working and developing them. It is evident that the ultimate object of the contract was to give him the right at any time within six months after its date to acquire an undivided half interest in the property for the sum of $500,000. In order that he might intelligently determine whether to exercise this option, he was to have an opportunity of testing the value of the property by an expenditure of money thereon, which, in case he failed to make the purchase, would inure to the benefit of the defendants. The consideration for the defendants' agreement to give him this option was his agreement to expend the sum of $10,000 in opening and developing the property, and building a quartz-mill thereon; and for this purpose the right to enter upon the mining claims was necessarily implied. The allegation in the complaint that he was placed in possession of the mining claims by the defendants "for the purpose of performing his part of the contract," was a contemporary construction by them of its meaning;

and the further allegation that immediately after its execution he notified them of his election to perform his part of the contract, and thereby acquire the undivided one-half interest in the mining claims, "as in said contract mentioned," was an acceptance by him of what was previously an offer, and created an enforceable obligation on his part to expend the said sum of $10,000. Whatever want of mutuality of obligation existed at the execution of the contract was thus removed, and the contract to this extent became binding upon all parties thereto: Hall v. Center, 40 Cal. 63; Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Sayward v. Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44.

The subsequent refusal by the defendants to permit the plaintiff to perform this obligation is a sufficient excuse for its nonperformance, and their repudiation of the contract prior to the expiration of the period of six months, and declaration that they would not execute him a deed for the one-half interest, released him from the necessity of tendering the $50,000 as a condition of maintaining the action: Civ. Code, sec. 1440; Sheplar v. Green, 96 Cal. 218, 31 Pac. 42.

It was not necessary to make Burcham a defendant in the action. It does not appear that he participated in preventing the plaintiff from entering upon the property or performing his part of the contract. No relief is sought against him, and there is nothing in the complaint to show that he is not willing to carry out the agreement of the defendants. The judgment is reversed, and the superior court is directed to overrule the demurrer to the complaint.

We concur: Garoutte, J.; Van Fleet, J.

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## TUFFREE et ux. v. STEARNS RANCHOS CO.

L. A. No. 387; October 1, 1898.

54 Pac. 826.

**Appealable Order.**—Under Code of Civil Procedure, Section 963, allowing an appeal from a special order made after final judgment, an order denying a motion to correct a judgment, or the file mark thereon, is appealable, where an appeal from the judgment will not present all the facts on which the motion is based.

**Judgment—Attack by Motion.—A Judgment Regular on Its Face** cannot be set aside on motion attacking its validity.[1]

**New Trial.—As to Time of Moving for New Trial,** Notice of intention, filed after judgment entered on a remittitur from the supreme court, may be given in reference to such judgment, rather than the original judgment.

**Evidence.—In a Trial to the Court, Plaintiff was Permitted** to detail a conversation with one of several defendants, the court remarking that it would take care that the evidence harmed no one else. Held, that there was no error.

APPEAL from Superior Court, Los Angeles County.

Action by J. K. Tuffree and wife against the Stearns Ranchos Company. From a judgment for plaintiff, from an order denying its motion to amend the judgment and to correct a file mark thereon, and from an order denying its motion for a new trial, defendant appeals. Affirmed as to the judgment, as to the order refusing to amend the judgment, and as to the order denying a new trial, and dismissed as to the order refusing the correction of the file mark.

E. W. McGraw for appellant; J. S. Chapman and A. M. Stephens for respondents.

CHIPMAN, C.—Plaintiffs, husband and wife, brought an action to quiet title, on complaint filed August 25, 1886, alleging ownership of the premises in the wife. Answers were filed for all the defendants, of whom there were many. The cause was tried, and findings were filed July 11, 1891, and judgment January 15, 1892. The judgment was that plaintiff Mrs. Tuffree was the owner in fee of the premises, and that defendant C. B. Polhemus has no right or title thereto, and that plaintiffs take nothing as to the other defendants. The cause was appealed by plaintiffs and by Polhemus to this court, and is reported in 108 Cal. 670, 51 Pac. 806. The judgment here, on that appeal, was given on October 2, 1895, and the judgment below was affirmed as to defendant Polhemus, and was reversed and judgment directed in favor of plaintiff Mrs. Tuffree as to all the other defend-

[1] **Cited** in National Metal Co. v. Greene Consolidated Copper Co., 9 Ariz. 196, 80 Pac. 398, the court saying: "When a party is driven to evidence dehors the record to show that a judgment is void, he should be permitted to do so only where the facts upon which he relies may be examined into under the forms and sanction of a regular trial."

ants except defendant Alfred Robinson. The remittitur went down November 2, 1895, and pursuant to directions therein the trial court entered judgment, which was indorsed: "Filed April 28, 1896. Docketed July 16, 1896. Entered July 15, 1896." On July 25th and 27th the court made an order substituting the Stearns Ranchos Company at its request for all the defendants, the company claiming to have succeeded to the interests of all the defendants, as set forth in supplemental answers. On July 18th counsel for defendant company and all other defendants served upon plaintiffs' attorneys a notice of motion that he would move the court "to have the file mark on said judgment corrected and altered so as to express the truth, to wit, that the date April 28, 1896, on said file mark, be stricken out, and in lieu thereof be stated July 15, 1896." Defendant company, as successor of the interest and on behalf of Moses Hopkins and Edward F. Northam, original defendants in said action, moved to amend the judgment by striking out the names of Hopkins and Northam so that the judgment shall not affect the interests formerly held by them. The ground of the motion was stated to be that Moses Hopkins died in February, 1892, prior to the appeal to the supreme court, and, being dead, was not a party to the appeal, that his executor was never substituted in his place, nor was the Stearns Ranchos Company, successor to his interest, substituted as a party; and the judgment of the supreme court did not affect such interest and was without jurisdiction. As to Northam, that he died in 1888, and Robert E. Northam, as executor, was substituted, but that he ceased to be such executor long prior to said appeal, to wit, March 1, 1889, on which day the estate was settled and the executor discharged; and that the supreme court never acquired jurisdiction over said executor, and the judgment as to him or the interest of Northam, deceased, was inoperative. The motion was heard, and on September 14, 1896, was denied. Defendant appeals from the judgment entered July 15, 1896; also from the order denying its motion to amend the judgment, and to correct the file mark thereon; also from an order denying defendant's motion for new trial. It was stipulated that all these appeals might be heard upon a single transcript.

The appeals turn largely upon the question as to the effect of the judgment upon the defendant's interest in the prem-

ises as successor to Hopkins and Northam. Appellant contends that this court never acquired jurisdiction to disturb the judgment of the lower court in favor of Hopkins and Northam, because Hopkins was dead before the appeal was taken, and the executor of Northam was discharged upon final settlement of his testate's estate before the appeal, and was as though dead.

1. Respondents contend that the order denying the motion to correct the judgment or the file mark is not appealable; citing Tregambo v. Mining Co., 57 Cal. 501; Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093. In the first of these cases the court said that an order refusing to set aside a default is not an appealable order; and in the other case, where the court granted a nonsuit on defendant's motion, and plaintiff moved to modify the judgment, this court said: "The order refusing to modify the judgment is not an appealable order." The question arises under section 963 of the Code of Civil Procedure, which gives an appeal "from any special order made after final judgment." The rule stated in 89 Cal. supra, must not be accepted as universal, but must be applied to the case as it there stood, where it appears that the appeal from the judgment gave plaintiff all the relief he could have received by the appeal from the order. We think the rule and its reason better stated in De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345, where it was held that an order refusing to set aside the judgment was appealable even though the judgment was appealable. Here, as in that case, the order is plainly within the statute, and, as there, an appeal upon the judgment-roll now here would not present all the facts upon which the motion is based. We see no reason why the appeal should not be entertained.

2. The view we have taken of the motion to annul the judgment as to Hopkins and Northam relieves us from the necessity of passing upon the question as to whether the conduct of the attorneys for all the original defendants and of the attorney for the substituted defendant, appellant, estops the appellant from calling the judgment in question; and it also makes unnecessary a construction of section 385 of the Code of Civil Procedure, under which respondents claim that as to defendant, the transferee of the Hopkins and Northam interests, the proceedings were regular, and defendant will

not now be heard to complain. This motion is not made under section 473, because of the mistake, inadvertence, surprise or excusable neglect of the defendant, but is a direct attack upon the validity of the judgment irrespective of that section. The rule is well settled by our decisions that a judgment void upon its face, or that by an inspection of the judgment-roll is found to have been given without jurisdiction, or for other reason thus appears to be void, will be set aside upon motion, without reference to the provisions of section 473. Such a judgment is said to be "a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists": People v. Greene, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197. But it has been held that this cannot be done upon motion where the judgment is valid upon its face or its infirmity cannot be ascertained by an inspection of the judgment-roll: Wharton v. Harlan, 68 Cal. 422, 9 Pac. 727; People v. Greene, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; People v. Harrison, 84 Cal. 607, 24 Pac. 311; Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22; Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; Dyerville Mfg. Co. v. Heller, 102 Cal. 615, 36 Pac. 928; People v. Temple, 103 Cal. 447, 37 Pac. 414; People v. Harrison, 107 Cal. 541, 40 Pac. 956; Young v. Fink, 119 Cal. 107, 50 Pac. 1060.

The rule that allows a judgment void upon its face to be set aside upon motion is eminently wise and just, but so much cannot be said of a rule that would allow a judgment regular upon its face to be thus attacked. When a party is driven to evidence dehors the record to show that a judgment is void, and he does not proceed under section 473, supra, he should be permitted to do so only where the facts upon which he relies may be examined into under the forms and sanctions of a regular trial. The code furnishes ample remedy for cases of surprise, excusable neglect, inadvertence and mistake; and this remedy is supplemented by the rule which allows the annulment by motion of a judgment within a reasonable time, when void upon its face. This, we think, is as far as the remedies should be carried by mere motion.

3. Respondents make the point that the notice of motion for new trial was not given in time. The findings on the original judgment, from which this present appeal is taken, were filed July 11, 1891, and judgment was entered January 16, 1892. The notice of intention to move for a new trial

now here was made July 25, 1896, and in time, if the entry of judgment upon the remittitur, July 15, 1896, is to control; but, if the date of the decision and filing of the original judgment is to control, the notice was too late. Appellant concedes that its notice was too late if Brady v. Feisil, 54 Cal. 180, upon which respondents rely, is a correct statement of the practice. We are asked to overrule that case. We do not think that Brady v. Feisil is a sound exposition of the right of appeal conferred by our statutes, and it is in effect overruled by Klauber v. Street Car Co., 98 Cal. 105, 32 Pac. 876. After clearly pointing out the reason why the first appeal might not present the errors of which the prevailing party in the lower court would have a right, but would be deprived of the privilege, of having reviewed, the court said: "As it is only when upon the second appeal the record presents the same matters, either of fact or law, upon which the determination of this court was rendered at the former appeal, that the determination is held to be final, it follows that, if there is presented upon the second appeal a different state of facts, or any errors that were committed by the trial court which were not presented in the former record, this court is at liberty to consider them as fully as though presented upon a first appeal." The defendant had the right to have any matters of law or of fact reviewed on a second appeal which would affect the judgment against Hopkins and Northam, under whom it claimed, and which had not been reviewed or determined on the first appeal. Where the judgment was directed to be entered upon the findings, as was the case here, the appeal would be upon the same evidence, and in many respects must be upon the same record; but the assignments of error would include those matters of which the prevailing party at the first appeal was precluded from having any consideration of by this court. The judgment was not final as to such matters until it was entered under direction of this court, and the notice of intention may be given with reference to that judgment. The question, then, is, Are there presented by this record any matters of law or fact not determined by the former appeal of which appellant can complain? We have compared the former transcript with the present one, and find that the appeal now is upon the same original pleadings, evidence, findings and original judgment. The remittitur and decree pursuant thereto, the substitution

of defendant for all the former defendants, and its answers and motions, are added to the original transcript. The specifications of insufficiency of the evidence to justify the findings are not identical with those assigned in the first appeal, but we are unable to discover that any questions raised by the appellant now, so far as the rights of appellant and respondents are involved, were not fairly raised and decided in the former appeal.

The rule we have laid down by which this second appeal is held to be properly taken we do not think should entitle appellant to have the former decision of this court reviewed except upon matters not previously considered. A comparison of the present with the former record and the opinion found in 108 Cal., supra, we think will show that the merits involved in this appeal, so far as they are related to the facts, had full consideration in the first appeal.

4. Counsel calls attention to but one alleged error of law occurring at the trial and excepted to by defendants. The court, against objection, permitted the witness Tuffree to relate a conversation with George H. Howard about making selections of land. The objection was as to all defendants except Howard. The court overruled the objection, remarking: "If it is admitted in evidence I will undertake to take care of it, and see that it don't harm anybody else." We find no error in the ruling.

5. As to that part of the order refusing to correct the file mark, we do not see that any right involved in the appeal is affected by it, and we therefore do not pass upon the question presented by the motion. If, in any future litigation, the date of entry of judgment should become material, it may be deemed an open question.

6. The appeal from the judgment presents no question except as to whether it is in conformity with the directions of this court, and, as there is no dispute as to the fact, there is nothing in this appeal.

Our conclusion is that so much of the order as refused to amend the judgment, the order denying a new trial, and the judgment appealed from should be affirmed; and, as to the motion and order relating to the change of date in the file mark of the judgment, that the appeal should be dismissed without prejudice.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion, so much of the order as refuses to amend the judgment, the order denying a new trial, and the judgment appealed from are affirmed; and, as to the motion and order relating to the change of date in the file mark of the judgment, that the appeal is dismissed without prejudice.

## STRATTON v. BURR et al.

L. A. No. 424; October 1, 1898.

54 Pac. 735.

**Sale—Change of Possession.—One Partner Transferred to a Creditor** of the partnership their stock of merchandise without the knowledge of his partner, who for a month previous had not had anything to do with the affairs of the firm. After the transferring partner had shown the new delivery boy the delivery route, he left the store, leaving it in charge of the purchaser's agent, who had been employed there for a month previous. Held, that under Civil Code, section 3440, making transfers of personal property unaccompanied by an immediate delivery, and not followed by continued change of possession, fraudulent as to creditors, the evidence was sufficient to show an actual and continued change of possession.

APPEAL from Superior Court, Los Angeles County.

Action by Minnie E. Stratton against John Burr and others. From a judgment in favor of plaintiff and an order denying a new trial defendants appeal. Affirmed.

Dillon & Dunning for appellants; H. T. Gordon and J. W. Swanwick for respondent.

BELCHER, C.—This is an action to recover the possession or value of certain personal property, alleged to have been wrongfully taken from the possession of the plaintiff by the defendant John Burr, as sheriff of the county of Los Angeles, on the tenth day of August, 1895. The defendant justified the taking of said property under and by virtue of a writ of attachment issued in an action commenced in the superior court of Los Angeles county on the tenth day of August, 1895, by one Gregory Perkins, Jr., against J. J. Stratton and

U. G. Stratton, copartners, doing business under the firm name of Stratton Bros. The answer denies that the taking was wrongful, and alleges that on the eighth day of August, 1895, Stratton Bros. were indebted to various persons in sums of money aggregating $992.50, and on the tenth day of the month the said creditors assigned their several claims to Gregory Perkins, Jr., who thereupon commenced said action; that, on the said eighth day of August, J. J. Stratton, for the sole purpose of preventing the creditors of Stratton Bros. from attaching said property, and to hinder, delay and defraud said creditors, without the consent or knowledge of said U. G. Stratton, entered into a secret and fraudulent agreement with Minnie E. Stratton, the plaintiff, under and by virtue of which it was agreed that said J. J. Stratton should transfer to the plaintiff all the property described in the complaint; that thereafter, on the same day, in pursuance of said secret and fraudulent agreement, said J. J. Stratton did sign a bill of sale of said property to the plaintiff, but the same was never delivered, and the pretended sale made in pursuance of said agreement was not accompanied by any delivery or by any change of possession of the things attempted to be so transferred.

The case was tried by the court, without a jury, and the findings were in substance as follows: On August 8, 1895, and for several months prior thereto, Stratton Bros. were copartners, engaged in the grocery business in the city of Los Angeles, and on that day were indebted to the various persons named in the answer in the aggregate sum of $992.50, and were indebted to the plaintiff in the sum of $1,115 for moneys theretofore loaned by her to them. On the same day, said copartners, for and in consideration of their indebtedness to the plaintiff, executed and delivered to her a bill of sale, whereby they sold and conveyed to her the property mentioned and described in the complaint; and the same was not made for the purpose of defrauding any person, but was executed by them and received by her for the sole and only purpose of paying the amount then owing by them to her. Said sale was accompanied by a delivery and change of possession of the property thereby transferred, and, prior to the sale, Stratton Bros. were in possession of said property. Immediately after the transfer of said property plaintiff took possession of the same, and remained in the possession thereof

until August 10th, at which date she was the owner and in the rightful possession of the same. On August 10th, Perkins, as assignee of said creditors, caused said property to be attached by the defendant in proceedings duly instituted and prosecuted to final judgment, under which the same was sold by said sheriff on execution duly issued. The Stratton Brothers were not in possession of said property when attached, and were not then the owners thereof. The value of the property was $900. Upon these findings judgment was rendered in favor of the plaintiff for the return of the property, or for the sum of $900, the value thereof, in case a return could not be had, with interest and costs. From that judgment and an order denying a motion for new trial this appeal is prosecuted.

It is not claimed by appellants that the transfer to the plaintiff was made with intent to hinder, delay or defraud any creditor of the transferrers or other person, or that there was any actual fraud in the transaction, but the contention is—and this is the only ground urged for a reversal—that the transfer was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things transferred. We do not think the judgment should be reversed on this ground. It has been held by this court in numerous cases that what constitutes an immediate delivery and an actual and continued change of possession is a fact to be determined upon the evidence in each particular case. "The circumstances connected with a transfer of personal property are so varied that it would be impossible to frame a rule applicable to each case, or to determine in advance what acts would be sufficient to meet the requirements of the statute. When the transfer is challenged as fraudulent under this section [section 3440, Civil Code], all the circumstances connected therewith are essential to a determination of its character, and it can very rarely be the case that there will not be such a conflict of testimony as to preclude this court from re-examining its sufficiency": Claudius v. Aguirre, 89 Cal. 503, 26 Pac. 1077; Byrnes v. Moore, 93 Cal. 393, 29 Pac. 70; Porter v. Bucher, 98 Cal. 459, 33 Pac. 335. Every intendment is in favor of a judgment of a court of record, and, until the contrary is made clearly to appear, the appellate court is bound to suppose that it was based upon proper evidence: Grewell v. Henderson, 7 Cal. 291. In view, there-

fore, of the circumstances shown in this case, we think it cannot be said that the evidence was insufficient to justify the court below in determining as a fact that the transfer to the plaintiff was accompanied by an immediate delivery, and followed by an actual change of possession, which continued until the property was seized by the defendant as sheriff.

It appears that, when the transfer was made, U. G. Stratton had had nothing to do with the business of the store for more than a month, and that, immediately after the transfer, J J. Stratton left the store, and after that had nothing to do with its business, except that on the morning of that day he went around with the newly employed delivery boy, and showed him the route for delivering goods to customers, and on the morning of the next day went again with the boy, and showed him another part of the route. Plaintiff's husband had been employed in the store as clerk and assistant to J. J. Stratton for about a month, and after the transfer he took charge of its business, and had full control and management of its affairs, as agent and employee of his wife. The case is in many respects similar to that of Ford v. Chambers, 28 Cal. 13, where, as stated in the syllabus, it was held: "If a merchant, having a stock of goods in his store, and engaged in a retail trade, with clerks in his employ, makes a sale in good faith of his entire stock in trade to a creditor, in payment of indebtedness and for a fair price, and the creditor immediately goes into the store, takes entire control of the business, and proceeds to take an inventory, and also to retail the goods to customers, with the assistance of the clerks of the vendor, this constitutes an actual and continued change of possession, and the sale is valid as against the creditors of the vendor, although there has been no formal discharge of the clerks of the vendor, and rehiring of them by the vendee." We advise that the judgment and order appealed from be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

## McRAE v. ARGONAUT LAND & DEVELOPMENT COMPANY.

Sac. No. 456; October 7, 1898.

54 Pac. 743.

**Appeal—Undertaking.—Where the Notice of Appeal Specifies** that it is taken from the judgment, and from an order denying a new trial, and the undertaking is one on appeal from the judgment only, the appeal from the order will be dismissed.

**Agency.—Testimony That Witness Acted as Agent** for another in a given transaction is competent proof of the fact.

**Evidence—Book Entry.—On an Issue Whether a Written Contract** was drawn up between plaintiff and defendant, where there was the positive evidence of two witnesses that such a contract was drawn, a refusal to permit defendant to show that a book containing a record of such transactions, kept by him, did not show an entry of a certain date of the drawing of such contract, was not reversible error, it appearing that defendant did not offer to prove that the book contained no entry in regard to the contract.

APPEAL from Superior Court, San Joaquin County.

Action by Mary McRae, administratrix of the estate of Malcolm McRae, deceased, against the Argonaut Land and Development Company. From a judgment for plaintiff and from an order denying defendant's motion for a new trial defendant appeals. Appeal from order denying new trial dismissed. Judgment affirmed.

Dudley & Buck for appellant; J. G. Swinnerton and J. A. Louttit for respondent.

HAYNES, C.—The notice of appeal in this case specifies that it is taken by the defendant from the judgment, and also from an order denying its motion for a new trial. The stipulation of counsel to the correctness of the transcript shows that the undertaking on appeal is from the judgment only, and respondent calls attention to this fact, and objects to a consideration of the appeal from the order denying a new trial. This objection is well taken, and the appeal from the order should be dismissed. The record contains a statement on motion for new trial, which respondent concedes

may be regarded as a bill of exceptions on appeal from the judgment; but, as the appeal was not taken within sixty days after the rendition of the judgment, exceptions to the findings upon the ground that they are not justified by the evidence cannot be considered: Code Civ. Proc., sec. 939, subd. 1. The only questions for consideration arise upon the rulings of the court upon matters of evidence. This action is prosecuted to recover for services rendered by one W. D. McLaurin for the defendant in reference to a large tract of land owned by it near the city of Stockton, the claim and demand therefor having been assigned by McLaurin to Malcolm McRae, plaintiff's intestate. McLaurin was employed by one George H. Fairbrother, who acted, or assumed to act, as the agent of the defendant. Fairbrother's deposition was taken by the plaintiff, and among other questions put to him by the plaintiff was the following: "During the time you were acting as agent, did you know W. D. McLaurin?" Defendant objected, on the ground that the question assumes the witness was acting as agent. Before this question was put, the witness had, without objection, testified generally, and without reference to McLaurin's employment, that he had acted as agent for the defendant. The question, therefore, assumed nothing, and was entirely proper. It was not an attempt to prove agency, as contended by appellant in its brief, but to show that while acting as agent he knew McLaurin. While the statements or admissions of one, not as a witness, that in a certain transaction he acted as agent for another, are not competent to prove the fact of agency, yet, if he is called as a witness, his testimony, not only that he acted as the agent of the party, but as to the fact of agency, and the nature and extent of his authority, where it rests in parol, is as competent as that of any other witness: Mechem, Ag., sec. 101, and cases there cited.

It is also contended by appellant that the court erred in sustaining plaintiff's objection to the following question put by defendant to its witness Eugene Wilhoit: "Q. Now, look on that record of May 20th, and see whether there is any record of any charge for any work done for that corporation by you." Fairbrother and McLaurin had each testified that a written contract between McLaurin and the defendant, for McLaurin's employment, was drawn up by Mr. Wilhoit, and Mr. Wilhoit had testified that he had no recollection of it;

that he kept a book in which he entered charges for work of this character, and the book shown him covered the period of this transaction. If he had examined the book and testified that no record of it appeared, taken in connection with his testimony to the effect that, if he drew the contract, it should be entered in the book, and that he had no recollection of drawing the contract, it would be competent evidence tending to show that he did not draw it. But the judgment should not be reversed for that reason. We cannot assume that the book would have shown that there was no entry of the drawing of the contract, and, in order to show injury from the error, the defendant should have offered to prove that it contained no entry in regard to it. This was not done; and, besides, if it were admitted that no entry of the transaction existed in the book, the nonexistence of the entry would be wholly insufficient to overcome the positive evidence of two witnesses to the fact that a contract was drawn. A careful business man may conscientiously swear to the correctness of items appearing in his books, but he must be a rash man who, doing a large business—as Mr. Wilhoit says he did—will swear that no proper item was ever omitted. Such evidence would be necessarily of a weak and inconclusive character.

It is also contended by appellant that the court erred in excluding a deed and lease offered in evidence by defendant. The record in this regard is so meager and indefinite that we cannot say that the court erred in excluding them. The record is as follows: "Whereupon defendant offered in evidence the deed from defendant corporation to John Boggs, said deed being recorded and dated May 20, 1890." "Defendant also offered in evidence the lease executed by and between John Boggs on May 20, 1890, for five years, of the same land referred to in the deed, the land being the land referred to in this action as the 'Stockton Garden Tract,' and which has been referred to as the land sold by the defendant to Boggs." These offers were made separately, and objections to each were sustained in their order. The offer of the lease does not even show who the lessee was. The deed and the lease bear the same date, and the term of the lease was five years. If the defendant was the lessee, the conveyance would not affect McLaurin's employment, whether it commenced before or after the conveyance; and in support

of the ruling we might properly assume that defendant was the lessee. But the testimony of McLaurin shows that about the time of his employment Fairbrother was making a trade of the land to Boggs, and upon cross-examination he said: "By the trade I mean the $12,000 a year rent to be paid by the Argonaut Land and Development Company to Boggs." The defendant being the lessee of the land, it is apparent that the conveyance did not dispense with or affect the employment of McLaurin, and therefore the evidence offered was immaterial.

No other errors of law are mentioned in appellant's brief, and we find none in the record which would justify a reversal. We advise that the appeal from the order denying a new trial be dismissed and that the judgment be affirmed.

We concur: Searls, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal from the order denying a new trial is dismissed and the judgment is affirmed.

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## HOWE v. HALSEY.

Sac. No. 414; October 7, 1898.

54 Pac. 748.

**Jurisdiction—Amount Involved—Interest.**—Under constitution, article 6, section 5, giving the superior court jurisdiction in cases in which the demand, exclusive of interest, amounts to $300, the compounding of interest on a note for less than $300, pursuant to its terms, does not convert such interest into principal, and hence the superior court has no jurisdiction of an action on the note, although the amount of interest compounded renders the amount involved in excess of $300.

APPEAL from Superior Court, Sacramento County.

Action by William S. Howe against Milton S. Halsey. From a judgment of dismissal plaintiff appeals. Affirmed.

Isaac Joseph for appellant; A. A. De Ligne and A. M. Johnson for respondent.

HAYNES, C.—This action was brought in the superior court of Sacramento county upon a promissory note dated April 4, 1894, for the sum of $200, payable one month after date, "with interest thereon from date until paid at the rate of five per cent per month, payable monthly, and, if not so paid, the interest may be added to the principal, and bear like interest, and the whole note may, at the option of the holder, without notice to the maker thereof, be treated as due and collectible. . . . . Both principal and interest to be paid at," etc. The court dismissed the action without prejudice, upon the ground that it had no jurisdiction, and the plaintiff appeals from the judgment of dismissal.

In this case the complaint set out a copy of the note, alleged that no part of the principal or interest had been paid, that at the time the original complaint was filed there was due "the sum of $415.67 principal, and interest thereon from July 4, 1895," etc.; and the prayer for judgment was for said sum of $415.67, and interest from July 4, 1895. Appellant contends that the ad damnum clause of the complaint determines the jurisdiction. That is undoubtedly the rule in proper cases, but it would certainly not be held that the superior court would have jurisdiction in an action for goods sold and delivered where the complaint alleged that the plaintiff sold and delivered to the defendant goods of the agreed price and value of $100, and that he had not paid for the same, or any part thereof, by reason whereof the plaintiff has been damaged in the sum of $500, and prays judgment for that sum; but where the complaint sets out several causes of action upon contract, each below the jurisdiction of the superior court, but which in the aggregate exceeds $300, exclusive of interest, it has jurisdiction. The rule, however, has its more general application in actions to recover damages for torts. Here the question is whether the provision in the note allowing the interest to be compounded monthly, and to bear like interest, converts the interest into principal to be treated as part of the sum loaned, or whether all beyond the sum named as the principal of the note is not interest, within the meaning of the constitution and statute fixing and defining the jurisdiction of the superior court. This precise question has been quite recently decided by this court in bank, adversely to appellant, in Christian v. Superior Court, 122 Cal. 117, 54 Pac. 518. Upon the authority

of that case we advise that the judgment of dismissal in this case be affirmed.

We concur: Belcher, C.; Chipman, C.

PER CURIAM.—For the reasons and upon the authority cited in the foregoing opinion the judgment appealed from is affirmed.

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## WALLACE v. RANDOL.

S. F. No. 804; October 7, 1898.

54 Pac. 842.

**Brokers—Bills and Notes—Consideration.—Plaintiff Brokers were Engaged** to sell certain property for a specified commission, one-half to be paid when the first installment of the price was paid, and the other half on the payment of the second installment. A sale was effected, it being agreed that the purchaser should be allowed one-half of the commissions. To settle the purchasers' claim that they were entitled to one-half of the entire commission on the payment of the first installment, plaintiffs allowed the former to retain half the entire commission, and entered into an agreement with them which recited that the purchasers had received the full amount of their commission, and plaintiffs were to have all the commission due on the second installment; and that certain non-negotiable notes contemporaneously executed by the purchasers to plaintiffs for plaintiffs' share of the commission on the first installment should be returned to the purchasers if the second payment "was completed." The second installment was not paid, and plaintiffs sued the purchasers on the notes. There was nothing to show that plaintiffs had in any way prevented the payment of the second installment. Held, that, irrespective of whether there was a tender of the second installment by the purchasers, and a wrongful refusal of the sellers to accept it, which of itself would "earn" the commission, plaintiffs were entitled to recover on the notes, since they were based on a valuable consideration, and the second payment was not "completed." [1]

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

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[1] **Cited** and followed in Hardin v. Dickey, 123 Cal. 515, 56 Pac. 259, where it was held that a receipt given by an officer to make up his record in a foreclosure suit may be explained by parol evidence showing that no money was, in fact, received.

Action by James H. Wallace against James B. Randol to recover on a note. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward J. Pringle for appellant; W. S. Goodfellow for appellee.

GAROUTTE, J.—The facts of this case, as disclosed by the record, are somewhat complicated. In many respects we do not see their materiality as bearing upon the merits of the present litigation, and proceed to state those we deem material. A Scottish company owned a large tract of land in the state of California, known as the "Chowchilla Ranch." They placed this ranch in the hands of a broker in London for sale at the price of $1,500,000, agreeing to pay him $75,000 commission if effecting a sale—one-half of this commission to be paid when the first installment of the purchase price was paid, and one-half upon the payment of the second installment. The London broker secured the services of Catton, Bell & Co., brokers of the city of San Francisco, to assist him in effecting a sale of the property, agreeing to pay them for their services three-fourths of the commission. The San Francisco brokers found purchasers in E. B. Perrin and James B. Randol, and agreed that they should be allowed one-half of the commission, which amount was to be credited upon the purchase price. Perrin and Randol paid the first installment of the purchase price. This payment was composed in part of commissions on the sale, and in crediting those commissions as part payment complications arose which have come to a head in this litigation. Thirty-seven thousand five hundred dollars in commissions being due when Perrin and Randol made the first payment, they claimed a credit to that extent. But the London broker claiming one-quarter interest in the commissions, and Catton, Bell & Co. claiming one-quarter interest, a difference between the parties arose. A one-fourth part of this commission earned amounted to $9,375. This difference between Perrin and Randol upon the one part and Catton, Bell & Co. upon the other part was settled in the following manner: Randol, having a one-third interest in the purchase, gave Catton, Bell & Co. his promissory note for $3,125, payable upon the second day of February, 1892. Perrin, having a two-thirds

interest in the purchase, gave his promissory note to Catton, Bell & Co. for $6,250, payable at the same time. The date of the payment of these notes was also the date when the second installment of the purchase price would fall due. As part of the transaction between the parties at this time an agreement was entered into, which recites: "Witnesseth, the said Randol and Perrin have this day received from Messrs. Catton, Bell & Company the sum of twenty-eight thousand one hundred and twenty-five ($28,125) dollars, in full payment of their share of the commission on the sale of the Chowchilla Ranch, situated in Merced and Fresno counties, and therefore waive all claim to any portion of the commission that is payable when the second payment is completed on account of the purchase of the ranch. . . . . The said Randol has this day given his note unnegotiable for $3,125 to the said Catton, Bell & Company, and the said Perrin his note unnegotiable for $6,250. Both of said notes are to be held as security for the payment of the shares of Catton, Bell & Company in the said commission, upon the understanding that, should the second payment to be made on account of the ranch out of which is to come the full share of Catton, Bell & Company in the commission, to wit, $28,125, be completed, the said notes are to be returned to the said Randol and Perrin, respectively; otherwise the notes shall be considered good and payable to the extent to which there may be deficiency in the commission of said Catton, Bell & Company." In due course the time arrived when these notes became due and payable. No second payment was made to the Scottish company upon the purchase price of the ranch, hence no commissions came to Catton, Bell & Co.; and this action was thereupon commenced against Randol upon his note by the assignee of the brokers. He now appeals from the judgment rendered against him. Clearing away the rubbish, we find the foregoing facts are practically all that are material to the consideration of this case. Both evidence and argument have been presented as to the liability of the Scottish company for the balance of the commission, and also time and labor have been spent in attempting to show that it was the fault of the Scottish company that the second installment of the purchase price upon the ranch was not paid, and also that Perrin and Randol made a legal and proper tender of such installment of the purchase price. It is fur-

ther disclosed that the original contract of purchase between the Scottish company and Perrin and Randol was subsequently modified, and practically supplanted, by other and different contracts. But we fail to see the materiality of these matters as bearing upon the pending litigation. The note here sued upon and the contemporaneous contract were matters arising entirely between Catton, Bell & Co. upon the one side and Perrin and Randol upon the other. They were contracts in which the Scottish company was not a party, and in the result of which it had no possible interest.

Let us see what the contract was between these parties. They had $28,125 in commissions to divide, one part to the brokers and two parts to Perrin and Randol. With the utmost liberality let us concede that Perrin and Randol claimed this entire amount, yet at the same time it must be conceded that Catton, Bell & Co. claimed one-third of it. Whatever may have been the exact claim of Perrin and Randol to the portion claimed by Catton, Bell & Co., to wit, $9,375, they induced those brokers to relinquish that claim, and as a consideration for such relinquishment they gave their respective notes to the brokers for the amount, payable February 1, 1892, the time when the balance of the purchase price fell due. And they thereupon agreed by the instrument from which we have quoted that, if such purchase price was not completed, then these notes were to be deemed immediately due and payable. This was a plain, fair contract entered into by the parties, based upon valuable considerations, and unless Catton, Bell & Co. in some way prevented the payment of the balance of the purchase price, they are entitled to recover in this action. Nothing of the kind is alleged. No fraud is suggested. It is apparent that the Scottish company, by any act upon its part, could not defeat recovery upon these notes, for it was in no sense a party to the transaction. Catton, Bell & Co., in making the contract were acting for themselves alone. Even the London broker had no interest of any kind or character in the matter. The notes would become due and payable upon the happening of a certain event, namely, noncompletion of the purchase price. This event took place, and under the terms of the agreement a cause of action at once arose. Conceding the alleged tender of Perrin and Randol to the Scottish company had the legal effect of an earning of the balance of the commission

agreed to be paid by that company—a matter not necessary to here consider—still that was not the condition specified in the agreement which was to render the notes nugatory. "Earning the commission" is not the equivalent of a "completion" of the payment of the purchase price. For the foregoing reasons the judgment and order are affirmed.

We concur: Harrison, J.; Van Fleet, J.

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## ROBERTS v. BURR.

L. A. No. 435; October 7, 1898.

54 Pac. 849.

**Sale—Intent to Defraud Creditors.—Civil Code,** section 3442, makes a question of fraudulent intent one of fact. Act of 1895 makes a voluntary transfer without consideration by one insolvent, or in contemplation of insolvency, fraudulent as to creditors. Held, that the rule under section 3442 of the Civil Code was not changed by act of 1895, except in transfers of the kind specially mentioned in the act.

**Sale—Change of Possession.—A Firm Composed of Father and Son** sold to the wife and mother jewelry, which was delivered to her and kept for three months in her house, where she resided with her husband and son, except when she intrusted a part of it to them to sell to obtain necessaries for the family, they returning it on failing to find a purchaser. Held, that there was an actual and continued change of possession, as against creditors.[1]

**Sale—Change of Possession.—A Mother Purchased Jewelry** from a firm composed of her son and another, and, after keeping the property three months, delivered it to plaintiff, to be sold on commission. Held, that the employment of the son by plaintiff to assist him in his business, under a contract to which the mother was not a party, did not indicate that there had been no actual and continued change of possession in the mother, as against creditors.

**Sale—Fraud on Creditors.—A Firm Sold Its Stock to a Creditor,** after which plaintiff purchased it from him, and published a newspaper notice stating that a member of the firm was his manager. Held, that as against firm creditors, who attached property of plaintiff as

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[1] Cited in note in Ann. Cas. 1912A, 608, on retention of vendor in employ of vendee as affecting change of possession.

Cited in Roberts v. Burr, 135 Cal. 157, 67 Pac. 46, as part of the history of the case. In the interval between the two hearings the plaintiff had amended, setting up actual fraud.

belonging to the firm, the notice was admissible to show the partner's connection with plaintiff's business.

Sale—Fraud on Creditors—Evidence.—As Against One Claiming Goods under a purchase from an insolvent firm, a statement of the firm to a mercantile agency long before the sale is not admissible in behalf of attaching creditors, if no actual fraud is alleged, and the only question is whether there was an actual and continued change of possession in the purchaser.

APPEAL from Superior Court, Los Angeles County.

Action by James H. Roberts against John Burr. From a judgment for defendant and an order denying a new trial plaintiff appeals. Reversed.

Jones & Newby for appellant; L. H. Valentine for respondent.

CHIPMAN, C.—Action to recover possession or the value of certain jewelry, precious and semi-precious stones, as bailee of the owner. Defendant justifies as sheriff under an attachment. Defendant had judgment, from which, and from the order denying motion for a new trial, plaintiff appeals. The trial was by the court without a jury.

S. E. Lucas & Son (composed of S. E. Lucas and James H. Lucas) were in the jewelry business at Los Angeles. Emily A. Lucas was wife to S. E., and mother of James H. She had made large advances of money to the firm out of her separate estate, and the firm owed her on August 2, 1895, nearly $6,000. On that day the firm conveyed by written bill of sale and delivered to her the possession of certain of their goods, the subject of this action, of the value of $5,025. November 14th and 16th Mrs. Lucas delivered the goods to plaintiff, to be sold on commission. On January 7, 1896, one Trafton, a creditor of the firm, commenced an action against the firm by attachment, and caused the goods to be seized. Subsequently he obtained judgment, and the property was sold under execution, Trafton becoming the purchaser for the amount of his judgment and costs, about $700. The court found "that the execution of the bill of sale was not accompanied by an immediate delivery, . . . . and was not followed by an actual and continued change of possession, . . . . and no actual and continued change of possession . . . . had occurred at the time of the levy of the attachment."

The court also found that plaintiff at the commencement of the action "was not the owner nor in the possession of, nor entitled to the possession of, the stock of jewelry . . . . described in the complaint, as against an attaching creditor of the said S. E. and James H. Lucas," and "that the said bill of sale . . . . is fraudulent and void against the creditors of the said S. E. and James H. Lucas."

Appellant challenges the sufficiency of the evidence to justify the decision. The sole question contested arises out of the finding that there was no immediate delivery followed by an actual and continued change of possession, as required by section 3440 of the Civil Code. It appears from the evidence, and is not contradicted, that Lucas & Son were indebted to Mrs. Lucas as already stated, and that on her demand for payment they sold and delivered to her the goods in question. S. E. Lucas took the package to her, and delivered it and the bill of sale to her, and received certain notes, aggregating over $5,000, in payment. There is no substantial conflict as to the following facts: Mrs. Lucas at the time resided with her husband and son in a house belonging to her. She placed the package containing the articles when delivered to her in a private satchel, and put the satchel in her bedroom closet, to which her husband had access. In October she delivered some of the articles to her husband and some to her son, to be sold to obtain necessaries for the family; but, finding no purchaser, the articles were returned to her and replaced in the satchel, which she kept under lock and key. With this exception, neither the husband nor the son had possession or control of the property at any time. Lucas & Son continued in business until September 2d, when they sold out to Lyons & Son, creditors, and the latter went into exclusive possession. No question is raised as to the bona fides of this sale. On November 13th, plaintiff took a lease of the premises, and purchased the fixtures and fittings of Lyons & Son, and the latter surrendered the premises to plaintiff. He went into business, and advertised himself as dealer in precious stones, and placed his name on the window. He received goods on sale from several persons. On November 14th and 16th, Mrs. Lucas personally delivered to him the articles she had purchased from Lucas & Son, to be by him sold upon commission. He receipted to her for the goods. He took James Lucas into the

store as manager, and agreed to share with him the profits of a certain part of the businesss and of the commissions, and James had the management in running the store. He reported sales to plaintiff from time to time, and they had settlements as to their share of the profits and commissions. James made return to Mrs. Lucas of sales of her goods made by plaintiff, paying over to her in all between three and four hundred dollars. Lucas, Sr., was at the store frequently, but took no part in its management. Both he and the son had advised the arrangement between Mrs. Lucas and plaintiff, and were present at the store when she brought the articles and delivered them to plaintiff; and James wrote the receipt, which plaintiff signed and gave to her. Plaintiff continued in charge and control of the business, James being the active manager; and on January 7, 1896, the attachment was served, and Mrs. Lucas' property was taken by the defendant sheriff. There is considerable evidence in the record, not summarized, tending more or less to bear upon the good faith of the sale, which might have some significance if actual fraud were alleged, but which, in our opinion, does not throw any light upon the issues, for the reason that there is no question of actual fraud presented by the pleadings or by the findings. Respondent cites Cook v. Cockins, 117 Cal. 140, 48 Pac. 1025, to the point that under section 3442 of the Civil Code, as amended in 1895, the question of fraudulent intent in cases arising under section 3440 of the Civil Code, is one of law, and not of fact, and that it was incumbent upon plaintiff to show the good faith of the transfer to Mrs. Lucas, as well as that it was accompanied by immediate delivery and followed by actual and continued change of possession. The provisions of section 3442 are unchanged by the act of 1895, except where the transfer is voluntary, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, in which case the transfer "shall be fraudulent and void as to existing creditors." With this exception, there is no change in the rule that fraudulent intent is a question of fact, and not of law, and when actual fraud is relied upon it must be alleged and proved: See cases cited in Cook v. Cockins, supra; Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045.

We think the fact that Mrs. Lucas claims by purchase from her husband and son cannot, of itself, in any way affect her

rights any more than if the purchase had been from a stranger. Nor do we see that an immediate delivery followed by an actual and continued change of possession of the goods could not and did not take place because it was under the same roof where all the parties resided. This court sustained a sale of hay by a husband to his wife, as against creditors of the husband, which was not moved from the corral where it was stacked on the homestead premises of the husband and wife, and where the wife was feeding it to her stock: Porter v. Bucher, 98 Cal. 454, 33 Pac. 335. The trial court took the case from the jury because in its opinion there could have been no change of possession such as the statute required. In speaking of this, it was said here: "If the ruling of the court below correctly stated the law, it would logically follow that, in order to make a valid purchase of hay from her husband, she must immediately remove the hay from the homestead, or buy it from day to day as she fed it to her cattle," and this the court held she was not called upon to do. We have seen that the wife may purchase personal property from her husband, the same as from a stranger. A rule, therefore, that would preclude her taking and holding the possession in the home of both, in the case of a purchase from the husband, would preclude the purchase of personal property from a stranger, and bringing it to her home, and continuing her possession under the same roof with her husband. But such a rule would practically deny the right altogether. There can be no doubt but that the wife may take and hold possession, notwithstanding her husband and son live in the same house: Bump, Fraud. Conv., sec. 132; Ludlow v. Hurd, 19 Johns. (N. Y.) 218; Wilson v. Lott, 5 Fla. 324; Porter v. Bucher, supra. What is meant by "continued change of possession" has been the subject of much comment, and has never yet been, and never can be, reduced to any fixed and certain rule. What would be regarded as in law continued possession under one state of circumstances would not be under other conditions of fact. It was said in Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500, so often quoted: "The word 'continued' was designed to exclude the idea of a mere temporary change; but it never was the design of the statute to give such extension of meaning to the phrase 'continued change of possession' as to require, upon penalty of the forfeiture of the goods, that the

vendor should never have any control over or use of them. This construction, if made without exception, would lead to very unjust and very absurd results." In the case at bar the possession was taken August 2d, and retained, with a single temporary interruption in October, until November 14th—over three months—and was then parted with, not to the vendors, but to a bailee of the vendee for sale. In October a portion of the goods was delivered to the vendors to sell, to obtain family necessities, but was returned to the vendee at once, no sale having been made. With this exception, the vendors never had possession after the sale. Many of the cases speak of an open and notorious possession, but the statute does not require a publication of ownership in all cases. "While our statute makes the want of an immediate delivery and continued change of possession conclusive evidence of fraud, it introduces no new rule as to what acts shall constitute delivery and change of possession": Godchaux v. Mulford, 26 Cal. 316, 85 Am. Dec. 178. The visible, open and notorious delivery and possession spoken of in the cases refer generally to sales of the entire business, or of some bulky object of property. Acts of secrecy or concealment would go far toward showing actual fraud, but the fact that Mrs. Lucas did not inform her husband's creditors of the purchase does not change her position. Her husband had a right to prefer her as a creditor, except as the transaction was open to attack under the insolvent law or for actual fraud. We cannot regard the temporary parting with possession to the husband and son of some of the goods, under the circumstances disclosed, as inconsistent with an immediate and actual and continued change of possession. Under our law, the husband and wife are not one person in the sense that the possession of one is the possession of the other, or concurrent possession.

There is no conflict in the facts. The property was delivered to plaintiff, who was engaged in selling other similar property. The contract was between him and Mrs. Lucas. She had no understanding with her son James about it. No doubt, she felt greater confidence in parting with the property to plaintiff, knowing that her son would be employed to assist in the sale of the goods, but we cannot say from the fact that the son was employed by plaintiff that her three months' previous possession cannot be regarded as con-

tinued possession, under the statute. Lucas & Son continued in business after August 2d until in September, when they sold out entirely to Lyons & Son, and gave up the store, and had no connection whatever with it. Lyons & Son continued until November 14th, when they sold out their fixtures and fittings to plaintiff; and he went into exclusive possession of the leasehold interest, and of the goods he put in. Both Lyons & Son and plaintiff published the change of proprietors in the usual way. The attaching creditor, Trafton, knew of these changes. We can see nothing in the statements made to him by Lucas, and in Lucas' failure to tell him of the sale to his wife, that should prejudice her rights, or as in the least bearing upon the question of change of possession or continued possession. The vendee knew nothing of these representations, and the vendors could not impeach her title by any such representations after sale to her. We think the employment of James Lucas by plaintiff did not in any just sense, under the facts in the case, indicate that there was not an actual and immediate and a continued change of possession of the goods from Lucas & Son to Mrs. Lucas. There is not the slightest evidence that he was there as a representative of the firm of Lucas & Son, and it is only because he was once a member of the firm that any such inference could be drawn.

2. Plaintiff offered in evidence an advertisement he had caused to be published in the "Los Angeles Times" on November 17th, announcing that he had purchased the jewelry business owned by S. Lyons & Son, "and will carry a fine stock of diamonds and opals; and J. H. Lucas, formerly of Lucas & Son, is now manager there." Plaintiff claims that it was relevant, as tending to show that the public was warned of the position occupied by James H. Lucas. Similar oral evidence was admitted to show Lucas' connection with the business, and we can see no reason why this public notice was not admissible.

3. The evidence offered by defendant, and objected to by plaintiff, of the report made to R. G. Dun & Co. in 1894 by Lucas & Son, was not admissible under any issue in the case. Actual fraud was not alleged. This evidence did not, as we can see, cast the faintest light upon the question of immediate and actual and continued change of possession of the goods sold long after the reports were made. Upon the essential

facts in the case there is no substantial conflict, and hence the question as to whether there was such change of possession as satisfies the statute becomes one of law, and may be here reviewed: Bell v. McClellan, 67 Cal. 283, 7 Pac. 699; Claudius v. Aguirre, 89 Cal. 501, 26 Pac. 1077. The judgment and order should be reversed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

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## SPRIGG v. BARBER.

L. A. No. 311; October 13, 1898.

54 Pac. 899.

**New Trial—Statement on Appeal.—An Order Denying a new** trial cannot be reviewed where the statement contains no specification of errors or the particular reasons relied on for the new trial.

**New Trial.—On Appeal from an Order Denying a New Trial,** the clerk cannot, by certificate, supply what is required to appear in the statement.

**New Trial—Appeal.—The Notice of Motion for a New Trial Constitutes** no part of the statement on appeal, without being referred to in the statement as such.

**New Trial—Appeal.—Error Assigned to the Introduction** in evidence of a judgment-roll of another action can only be considered upon the review of the order denying a new trial.

APPEAL from Superior Court, San Diego County

Action by Patterson Sprigg against C. L. Barber. From a judgment for defendant and an order denying a motion for a new trial plaintiff appeals. Affirmed.

Withington & Carter for appellant; Haines & Ward for respondent.

CHIPMAN, C.—Respondent submits, in limine, "that the record fails to disclose for review, either on the appeal from the judgment or from the order, any question arising out of

any proceedings upon the trial, outside of the judgment-roll, for the reason that the statement specifies no ground of alleged insufficiency of evidence, or of alleged errors of law argued before the court for the new trial." Judgment was entered March 20, 1896, and filed March 21, 1896. On March 28th plaintiff served notice of motion for a new trial. The transcript contains what purport to be minutes of the court, to show that on April 10th, the parties being present, plaintiff by his attorneys, and defendant in person, plaintiff moved the court to set aside the decision rendered March 20th, wherein judgment was given, and to grant plaintiff a new trial upon the grounds stated in the notice. The motion was made upon the minutes of the court, the record in the cause, and evidence taken. Motion was denied, and plaintiff excepted, and served notice of appeal April 17th. This part of the record (except notice of appeal) is not authenticated in any manner except by the clerk's certificate at the end of the statement, and follows immediately after the judgment-roll in the transcript. Then follows the statement, which was settled by the judge September 11, 1896. In the statement there is no copy of the notice of motion or its specifications, and no copy of the motion itself, and no reference made to them, and no specifications of error in any form. The statement contains only the evidence introduced at the trial, and the rulings of the court as they there occurred, the notice of appeal, and the clerk's certificate. The question is, Can this court look beyond the judgment-roll and the statement, and consider the motion and the grounds stated therein, and the specifications found with the notice of motion? These questions, we think, are answered in the negative in Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012. There, as here, there was a failure to embody in the statement any specifications whatever of the errors or particular reasons on which the moving party relied, and it was held that the motion could not be considered. The clerk certified, among other things, in the case now here, that certain original documents were of record and on file in his office "in said entitled case, . . . . to wit, judgment-roll, notice of motion for new trial, order of court denying said motion, statement on appeal, notice of appeal, and service thereof." We do not think the clerk can supply by certificate what the law requires should be made to appear in the statement. The

judge settles the statement, and in this case he certified to its correctness as it appears in the transcript. The clerk has no power to add to or take from that statement as thus settled. In Leonard v. Shaw it was said that, although the notice contained the required particular errors and objections relied upon, "this did not, however, obviate a specification of the errors and objections in the statement to be made in such cases after a hearing of the motion." This must necessarily be so, since the notice forms no part of the record. If appellant had made some reference to the notice and motion in the statement as constituting a part of the statement, and located or identified them at some place in the transcript so that it could be reasonably inferred that they formed a part of the statement as settled by the judge, this would, we think, have been sufficient; but without some such reference, or making them a part of the statement, this court cannot consider them.

Appellant's counsel say in their brief: "The language of the court in repeated cases would lead the practitioner to the conclusion that the place for the specifications was in the notice; and, if found therein, they had served their purpose, and need not be brought up in the record." In support of this statement we are cited to Buckley v. Althorf, 86 Cal. 643, 25 Pac. 134. That case held that, where a motion for a new trial is submitted on the minutes of the court, the notice of the motion must specify the particulars wherein the evidence is claimed to be insufficient, and the errors of law relied upon; and that, failing in this, no subsequent statement is authorized, and, if made and settled, will not be considered on appeal. But it is nowhere intimated in the opinion that, having made the requisite specifications in the notice, they need not be restated in the statement. On the contrary, it was there said: "His motion for a new trial having been submitted on the minutes of the court, he could only bring to this court, on appeal, matters other than those appearing in the judgment-roll, by bill of exceptions, or a 'statement of the case subsequently prepared' "; citing Code Civ. Proc., sec. 661. Subdivision 4 of section 659 prescribes that, if the ground of the motion, when made upon the minutes of the court, be for insufficiency of the evidence or errors of law, the notice must specify the particulars, failing in which the motion will be denied; but this subdivision does not dis-

pense with the statement, or give the slightest intimation that the statement need not contain what subdivision 3 of the same section says the statement must contain, to wit, "the statement shall specify the particular errors upon which the party will rely." In Re Westerfield, 96 Cal. 113, 30 Pac. 1104, cited by appellant, the question was only as to the sufficiency of the notice. Pico v. Cohn, 78 Cal. 384, 20 Pac. 706, is also cited. That case would seem to be against appellant's contention. It was there held that the notice of intention to move for a new trial is not made a part of the record on appeal, and need not be embodied in the statement, or presented on appeal in any form, unless the respondent insists that it is insufficient. The notice was held to be the basis of the motion, "and that, upon the proper statement being filed, and the necessary motion made and passed upon by the court below, the notice has performed its functions, and is not a necessary part of the record on appeal, or to be presented in any form. When the case comes to us we look to the statement or bill of exceptions, and the specifications in which the court below is not sustained by the evidence, and the specifications of errors of law, as our guide in reviewing the case; and to these alone. If a question is presented by such specifications, and is properly saved in the statement or bill of exceptions, this court will look no further, but must presume that the question was properly presented to the court below, and passed upon in its rulings upon the motion for a new trial." Southern Pac. Ry. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627, is also cited. The opinion affirms Pico v. Cohn on the point as to the notice of intention above noted, and decides that the order denying the motion is deemed excepted to, and need not be embodied in the bill of exceptions. We find in the opinion no intimation that specifications of particular errors may be dispensed with in this statement beyond this. We are unable to verify, from the decisions, the claim that this court has encouraged the belief that the only place for the specification of errors is in the notice. It seems to us that when it was held that the notice formed no part of the record the plain inference would be that the specifications must appear in the statement, for surely they should appear somewhere. Counsel claim that this court must presume, when the trial court has settled a statement showing the exceptions and the evidence

pertinent thereto, that the ground was argued before the trial court. But this is to ask the court to supply by presumption what the code says must be embodied in the statement: Code Civ. Proc., sec. 659.

2. Appellant claims that, even if the motion for a new trial cannot be considered, the whole case is open for consideration upon the appeal from the judgment upon the objection made by plaintiff to the introduction of the judgment-roll as evidence by defendant in a certain case theretofore tried in the superior court of San Diego county. It was objected to by plaintiff as incompetent, irrelevant and immaterial, and was admitted, plaintiff excepting. We are unable to see, and respondent fails to show, that this was more than an error of law occurring at the trial, which, like any other error arising in course of the trial, can only be heard upon a consideration of the motion for a new trial.

It results from the foregoing that the case is here on the judgment-roll alone, and, as no question is raised as to the sufficiency of the findings to justify the decision, the judgment and order should be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## BANK OF LEMOORE v. GULART et al.

Sac. No. 460; November 18, 1898.

54 Pac. 1111.

**Guaranty.—B. Agreed in Writing With R. to Pay a Note** of R. and G. out of the proceeds of sheep mortgaged to B. by G. B. telephoned the payee that he had agreed to pay the note, and asked for thirty days' extension, which was granted on consideration of his promise. He sold the sheep, and shortly after "guaranteed full payment," and asked for another extension, and subsequently paid some interest. The sheep were attached in an action against G., and, to secure the release, B. paid the attachment debt, after deducting which, and expenses, the proceeds of the sheep were insufficient to pay the note. Held, that B. had obligated himself unconditionally to pay the

note in full, and had not limited his liability to the proceeds remaining after all claims against the principal were satisfied.

**Guaranty.—Where a Person Who Agreed to Pay Another's Note,** which was payable to a bank, telephoned the cashier that he had agreed to pay it, and thereby secured an extension, the bank's acceptance of the new agreement is inferred.

**Guaranty.—An Agreement of the Maker of a Note, Restricting** the liability of one who had promised to pay it, is ineffectual, as against the payee, where it was made after the payee had accepted the promise.

APPEAL from Superior Court, Kings County.

Action by the Bank of Lemoore against Manuel S. Gulart and others. From a judgment for plaintiff, defendant Joe D. Biddle appeals. Affirmed.

H. L. Smith for appellant; M. J. Short for respondent.

BELCHER, C.—This is an action to recover the amount due on a promissory note for $600 executed by defendants Gulart and Rose to the plaintiff on November 22, 1892, payable six months after date, and bearing interest at the rate of one per cent per month. It is alleged in the complaint that on July 24, 1893, defendant Biddle signed and delivered to defendant Rose a written agreement whereby, for a good consideration expressed therein, he promised and agreed to pay to the plaintiff the said promissory note sued upon, out of the proceeds of a band of sheep that day mortgaged to him by defendant Gulart—the payment to be made in about thirty days, or as soon as the sheep should be sold; that on or about the same day plaintiff agreed to and did accept the promise made by Biddle to pay the said note, and that Rose performed all the conditions of the said agreement to be by him performed; and that the said sheep were delivered to Biddle, and had long since been sold by him, but he had not paid any part of the principal of the said note, or any of the interest due thereon, except the sum of $40, which was paid by him about February 3, 1894. Rose answered, admitting all the averments of the complaint, and alleging that shortly after the execution and delivery of the said agreement the plaintiff, for a good and sufficient consideration, promised to and did release and discharge him from all liability for or on account of the said note, or any part thereof. Biddle

answered, denying his liability upon the said agreement, because Rose and he had, subsequent to the execution thereof, entered into other agreements which took the place of the one sued upon, and which had been fully executed by him before the commencement of this action, and that, if liable to plaintiff for any sum, it was for $121.35 only, that being the amount of the proceeds of the sale of the sheep mentioned in the said agreement. The cause was tried by the court without a jury, and the court found, among other things, that all the allegations of the complaint were true, and all the allegations and denials of the said answers were untrue. Judgment was accordingly entered in favor of the plaintiff and against the defendants Rose and Biddle for the amount claimed in the complaint. From that judgment Biddle alone appeals, and the case is brought here on the judgment-roll and a bill of exceptions.

Appellant contends that the findings were not justified by the evidence, but we think they must be sustained. By the agreement of July 24, 1893, appellant promised unconditionally to pay the note in suit to the plaintiff out of the proceeds of a band of sheep, when they were sold; and on or about the same day he called up, by telephone, D. O. Carr, the cashier and secretary of the plaintiff bank, and told him that he had made an agreement by which he agreed to pay the note of Rose and Gulart (the note in suit), and that he would pay the interest up right away, and would like thirty days on the note. In answer, Carr told him that, in consideration of his saying he intended to pay the note, they would not press the matter for thirty days. And Carr testified: "What caused me to extend the time to pay the note was the fact that Joe D. Biddle agreed to pay it." Appellant sold the said sheep in September, 1893, for $1,875, and on December 16, 1893, he wrote to the Bank of Lemoore, saying: "Say, Friend Carr. . . . . Can't you let the note run, say, a little longer? Will send you the interest, and pay up at once. The note is strictly A1. Will guarantee full payment." And about February 3, 1894, he paid $40 on account of the interest due on the note.

It is claimed, however, that, if appellant is liable to the plaintiff to pay the note sued upon, the extent of his liability is the proceeds of the sale of the sheep, and that by the word "proceeds," as used in the agreement, was meant the net

sum remaining after all other claims against them should be satisfied; that, at the time the said agreement of July 24th was executed, the said sheep were the property of Gulart, and were held by the sheriff under a writ of attachment issued in an action commenced against him by one Dickey; that, to obtain possession of the sheep, appellant had to and did pay the claim of Dickey, amounting to about the sum of $1,300; and that the expense of keeping the sheep from the time he received them until the sale, and the expense of the sale, amounted to the sum of $454, leaving in his hands, as the net proceeds of the sheep, the sum of $121.35, for which sum only he could be held liable. The obvious answer to this position is that when appellant signed the agreement to pay the said note, and telephoned Carr that he had made an agreement by which he was to pay it, he knew of the attachment and the conditions under which the sheep were held, and yet placed no limitation or restriction upon his liability to pay the note in full; and that he did not then mean that the "proceeds" should be what might be left after paying off Dickey's attachment claim is quite conclusively shown by his letter of December 16th, by which he admits his liability to pay the note, and expressly guarantees full payment thereof. It therefore, we think, clearly appears from the evidence that appellant obligated himself unconditionally to pay to the plaintiff the full amount due on the said note; and the court having, in effect, so found, the findings cannot be disturbed on this ground.

Appellant also contends that there is no evidence to support the finding that the agreement of July 24, 1893, was accepted by plaintiff on or about its date. Carr testified that for nearly six years he had been the cashier and secretary of the plaintiff corporation, and that he extended the time to pay the said note at appellant's request, and because he had agreed to pay it. The cashier of a bank is an executive officer thereof, and is charged with large powers and duties in the management of its financial business, and "notice to the cashier of a bank relative to any matter falling within the scope of his official employment is notice to the bank": Boone, Banking, sec. 134. It appears, therefore, that Carr, as cashier, had notice of the said agreement, and acted upon it in granting the extension, and this notice must be held to be notice to the bank. Under these circumstances it should be as-

sumed, in the absence of any evidence to the contrary, that the bank knew of and approved the action of Carr in regard to the note, and also knew of and accepted the agreement.

Appellant further contends that the court erred in certain rulings upon the admission of evidence. When appellant was on the stand as a witness in his own behalf he testified that in August, 1893, the said sheep were held by the sheriff under attachment issued in the suit of Dickey v. Gulart, and that he released the attachment by paying Dickey's claim of about $1,300, and that at the time he paid the said claim he received the sheep from the sheriff, and thereafter kept them until sometime in September, when he sold them. He was then asked by his attorney: "What agreement, if any, did you have with Gulart and Rose in regard to the repayment of money which you paid to Dickey for the release of the sheep from the attachment?" Plaintiff objected to the question as irrelevant, incompetent and immaterial, and a variation of a written contract, and the objection was sustained. The attorney then said: "I offer to show by this witness that on August 22, 1893, the time he paid the $1,300 to release the sheep from the attachment in the case of Dickey v. Gulart, it was agreed between Rose and Gulart and this witness that if the witness, defendant Biddle, would pay the money to release them from the attachment in the case of Dickey v. Gulart, that when the sheep were sold he could retain out of the proceeds of the sale the amount of money which he paid for the release of the attachment, and that he could also retain out of the proceeds of the sale the amount of money which it cost to run the sheep, and the amount of money to cover the expense of the sale, and the balance of the proceeds were to be applied in satisfaction of the contract of July 24, 1893." Plaintiff objected also to this offered evidence, upon the ground that, if received, it would be irrelevant, incompetent and immaterial, and a variation of a written contract; and the objection was sustained. The rulings complained of were, in our opinion, proper, and should be sustained. Having entered into an agreement in July to pay the note to the plaintiff, and that agreement having been accepted and acted upon by the plaintiff, appellant could not in August, without the knowledge or consent of plaintiff, make any new agreement with Rose and Gulart whereby his liability to plaintiff would be limited, changed or modified in any respect. And

that appellant did not himself consider that he had to any extent been released from his obligation to the plaintiff to pay the note is shown by his letter of December 16th, in which he again guarantees the full payment of it. The record, in our opinion, discloses no valid ground for reversal, and we advise that the judgment be affirmed.

We concur: Chipman, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## SAN DIEGO COUNTY v. RIVERSIDE COUNTY.

L. A. No. 391; November 19, 1898.

55 Pac. 7.

**Counties—Presentation of Claims.**—Statutes of 1893, page 346, sections 43, 44, requiring a second presentation of claims allowed in part to the board of supervisors before bringing suit for the balance, do not apply to claims wholly rejected.

**Counties—Change of Boundaries and New Counties—Apportionment.**—Act of March 11, 1893 (Stats. 1893, p. 158), erected a new county out of existing ones, and provided that commissioners should apportion the property and indebtedness of the old county and the new one. At that time certain railroad taxes were delinquent for each of eight years, and the railroad company paid the first six years' taxes, but left the taxes for 1886–87 unpaid. Under the reassessment act of March 23, 1893 (Stats. 1893, p. 290), the state board of equalization reassessed the latter taxes, and apportioned the valuation and taxes between the two counties according to the mileage in each. After the passage of the reassessment act, but before the reassessment, the commissioners apportioned the property of the old county, including taxes due, and fixed a ratio for the division of said taxes, excepting the taxes for 1886–87, and adjusted the indebtedness between the counties. The latter taxes were afterward paid into the treasuries of the old and new counties in the ratio established by the state board of equalization. Held, that, the commissioners having made no adjustment of the respective rights of the counties in them, an action by the old county to recover the amount of said taxes paid to the new county would not lie.

APPEAL from Superior Court, Los Angeles County.

Action by the county of San Diego against the county of Riverside. There was a judgment for plaintiff and defendant appeals. Reversed.

L. Gill, Charles R. Gray and E. W. Freeman for appellant; A. H. Sweet, Alexander Hughes and Goodrich & McCutchen for respondent.

CHIPMAN, C.—Action to recover certain taxes paid by the Southern Pacific Railroad Company upon reassessment by the state board of equalization for the years 1886 and 1887, under the provisions of the act of March 23, 1893 (Stats. 1893, p. 290), paid by that company to the state treasurer, and by him to defendant county. Defendant interposed a demurrer to the complaint, which was overruled; and, defendant declining to answer, plaintiff had judgment for $9,104.65, from which defendant appeals. The demurrer challenges the jurisdiction of the court as to both the person of defendant and the subject matter of the action, and the sufficiency of the facts alleged.

1. It is contended that the complaint is insufficient in showing that the claims sued upon were presented but once to the board of supervisors; citing sections 43 and 44 of the county government act (Stats. 1893, p. 346); Arbios v. San Bernardino Co., 110 Cal. 553, 42 Pac. 1080. In the case cited this court construed these sections to require a second presentation of a claim before suit where the board has allowed a portion of the claim presented and rejected the remainder; and the reason stated was that the board should have an opportunity to again consider the claim, if the amount allowed was not satisfactory to the claimant, so as to avoid, if the board should change its mind, the cost of litigation which might be imposed by section 44. Where the whole claim is rejected, as in the case here, the statute does not require a second presentation.

2. Riverside county was carved out of San Diego county and San Bernardino county by act of March 11, 1893 (Stats. 1893, p. 158). The railroad company at that time was a tax delinquent for the years 1880 to 1887, inclusive. It appears from the allegations of the complaint that the company paid the tax to these counties for the years 1880 to 1885 sometime during the year 1893; but for the years 1886 and 1887 the tax was levied upon the reassessment made under the act of

March 23, 1893, and was not paid until 1894. The action relates to the tax for these last two years. The act of March 11, 1893, creating Riverside county, contains a section, apportioning the public property and debts of the counties concerned, not unlike the one found in the act of March 11, 1889 (Stats. 1889, p. 123), creating Orange county. Section 9 of the act of March 11, 1893, supra, provides for the appointment of commissioners, and among their duties were the following: "Said board of commissioners shall, immediately after its organization, ascertain the indebtedness of San Diego county existing at the time this act takes effect, and also the total value of all property at that time belonging to said county of San Diego. They shall ascertain the assessed value of all property in San Diego county, as it stood before this act takes effect, according to the assessment made for San Diego county in the year eighteen hundred and ninety-two; also the assessed value, under the same assessment, of all property in the territory hereby set apart from San Diego county and embraced in the county of Riverside. They shall find the difference between the amount of the indebtedness of San Diego county and the value of the property belonging to San Diego county at the time this act takes effect, and, if such indebtedness exceeds the value of such property belonging to San Diego county, the county of Riverside shall pay San Diego county a due proportion thereof, to be determined as follows." Directions are given how to find this "due proportion," and the commissioners are directed to report the amount constituting this proportion to the boards of supervisors of the respective counties; "also, the value of any property belonging to San Diego county at the time this act takes effect which is situated in the county of Riverside. The sum of said ascertained value of said last-mentioned property, added to the ascertained proportion of said excess which the county of Riverside is to pay to San Diego county, shall be an indebtedness from the county of Riverside to the county of San Diego. Said property, situated as aforesaid in the county of Riverside, shall, upon settlement therefor as provided in this act, become the property of the county of Riverside, and San Diego county shall pay the entire indebtedness of San Diego county." Provision is further made for adjusting accounts after the excess in the value of the property over the indebtedness in either county is ascertained, and then fol-

lows a provision authorizing a tax by Riverside county should it, upon final settlement, be found indebted to San Diego county. The corresponding section found in the act organizing Orange county is set out quite fully in Los Angeles Co. v. Orange Co., 97 Cal. 329, 32 Pac. 316, and Orange Co. v. Los Angeles Co., 114 Cal. 390, 46 Pac. 173. It is alleged in the complaint that this board of commissioners was duly organized under the act, and to carry out its directions, and that "they proceeded to discharge their duties under said act"; that "they reported their proceedings to the boards of supervisors of San Diego county and Riverside county in October, 1893, ascertaining the sum of $2,782.86 to be due the county of San Diego by the county of Riverside on account of the matters which were considered by said commissioners." Among other things, it fixed a ratio of apportionment, "which ratio was subsequently ratified and accepted by the respective boards of supervisors of said counties, and adopted by them in the division of the taxes for the years 1880, 1881, 1882, 1883, 1884 and 1885, which had been reassessed against said railroad company, and paid over to the officers of the two counties, as hereinafter explained. But the taxes for the years 1886 and 1887 were not considered or in any manner adjusted by the said board of commissioners or the boards of supervisors of the two counties." The complaint then alleges that on August 24, 1894, while the taxes for these two years remained duly levied, but uncollected, the state board of equalization, "under and by virtue of the act of March 23, 1893, reassessed said railroad company for taxation" for these years, and improperly apportioned the amount to be paid to each county at the rate of $10,000 per mile—$877,000 to San Diego county and $926,000 to Riverside county—and reported the same to the auditors of the respective counties as the basis for taxation of the railroad company by them, and the property of the company was taxed in accordance with such apportionment. It is further alleged that the railroad company paid the tax to the state treasurer, and he paid the same to the respective counties as apportioned by the state board of equalization. The commissioners made the adjustment in October, some months after the reassessment act was passed, and presumably knew of its provisions, and that a reassessment for the years 1886–87 would be made.

These allegations of the complaint sufficiently show the nature and foundation of the action. No explanation is given as to why the commissioners did not adjust and apportion the taxes for the years 1886 and 1887. They did adjust the unpaid taxes for the years 1880 to 1885, inclusive, which had remained unpaid; and the commissioners evidently regarded (and properly, we think) the matter of adjusting these taxes as coming within the jurisdiction conferred upon the commissioners by the act under which they were constituted. These "back taxes" were treated as property formerly belonging to San Diego county; and if, for some unexplained reason, the railroad company paid the taxes to the counties for the years 1880–85, and refrained at that time from paying for the years 1886–87, until reassessed under the act of 1893 (if such be the fact), we cannot see that the question as to whether the matter properly belonged to the commissioners to adjust was affected thereby. The claim against the company for these taxes may have been in "abeyance" because "some question arose as to the validity of the provision of the act of the legislature for the collection of said taxes," as is alleged in the complaint; but it was a claim as much as was the claim for the back taxes of the other years, and was, we think, one of the matters confided to the commissioners for adjustment by the legislature. In Orange Co. v. Los Angeles Co., supra, the action was for a claim that had been omitted by the commissioners because they were ignorant of its existence, but was such a claim as the commissioners could have taken into account and apportioned. This court said: "In creating the county of Orange, the legislature determined how the debts and property of Los Angeles county should be divided and apportioned, as it had full power to do. The act prescribed the limits of each county's rights, and the methods by which they were to be ascertained. In performing their duties the commissioners doubtless intended to make the division as required, and, if they failed to do so, the failure arose through mistake. The mistake was one, however, which in our opinion can be corrected by legislative action only, and not by the courts." A similar claim to the one now before us was presented by the county of Colusa to the county of Glenn, arising upon the division of the latter county and under the reassessment act of 1893. In the act dividing these counties no provision was made for any apportionment of the

public property or of the debts or credits of Colusa county between it and Glenn county. It was held on demurrer in such case that the whole thereof belonged to Colusa county, citing Los Angeles Co. v. Orange Co., 97 Cal. 329, 32 Pac. 316; Tulare Co. v. Kings Co., 117 Cal. 195, 49 Pac. 8. But the point as to whether the tax paid in 1894 was upon the original assessment, or upon a reassessment, and what effect, if any, that question would have in the case, was not decided, but left open to be pleaded by defendant: Colusa Co. v. Glenn Co., 117 Cal. 434, 49 Pac. 457. In the present instance the legislature provided a board of commissioners to determine how these matters should be adjusted, and we think in such case the courts cannot be called upon to perform its duties: Sedgwick Co. v. Bunker, 16 Kan. 498; Orange Co. v. Los Angeles Co., supra.

From this view of the case, it becomes unnecessary to pass upon the questions, so fully discussed by the respondent, namely: When was the obligation to pay this tax incurred? Did San Diego county lose her right to this tax by the mere segregation of a portion of her territory? Did the act of March 11, 1893, deprive her of the right to receive this tax? These are questions not necessary to be decided in this case, and are therefore not now passed upon.

Respondent states in its brief that all the facts were set forth in the complaint in order to have the right of action determined on the demurrer, from which we infer that the complaint cannot be amended so as to obviate the objections made to it. The judgment should therefore be reversed, with directions to dismiss the action.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed, with directions to dismiss the action.

## CLINE v. ROBBINS.

Sac. No. 349; November 21, 1898.

55 Pac. 150.

**Deed as Mortgage.—A Judgment Declared an Instrument in** form a deed absolute to be a mortgage, and provided that it should be foreclosed, and that each party should pay his own costs and one-half of the jury fee. The jury fee had been paid by plaintiff, the mortgagor. The mortgagee appealed, whereupon the decree was modified by denying a foreclosure because not prayed for, and by directing that the decree fix a reasonable time within which the mortgagor should pay the balance due, and that, in default of such payment, the action should be dismissed. An "amended" judgment was then entered in the lower court, in accordance with the mandate, but it made no reference to costs or jury fees. Held, that the original judgment, in so far as it referred to the costs or jury fees, was not affected.

**Deed as Mortgage.—A Judgment Declaring a Deed to be a Mortgage,** and ordering a foreclosure of it, found the amount due the mortgagee, and directed that "the commissioner . . . . pay to plaintiff [the mortgagor] or his attorney, out of said proceeds [of the foreclosure sale], the sum of thirty-six dollars, jury fees, costs of this suit." Held, that the cost should be deducted from the amount due the mortgagee, and not from the proceeds of the sale.

**Deed as Mortgage.—A Judgment Declared a Deed a Mortgage,** and ordered defendant, the grantee, to reconvey on payment of a certain sum, and directed that, unless the payment was made within a certain time, the action should be dismissed. Held, that it was no ground for dismissing the action that prior to a tender the grantor conveyed the property in fraud of creditors.

APPEAL from Superior Court, Nevada County.

Action by J. T. Cline against H. A. Robbins. From an order made after final judgment denying defendant's motion to dismiss the action defendant appeals. Affirmed.

Thos. S. Ford for appellant; J. M. Walling for respondent.

HAYNES, C.—This appeal is from an order made after final judgment denying appellant's motion to dismiss the action. Cline brought an action to have it adjudged that a certain instrument, in form a deed absolute, was in fact a mortgage, and for an accounting between himself and defendant Robbins, who was in possession of the property, and

receiving its rents and profits, and offering to pay any balance that might be found due from him to the defendant. The defendant denied that said instrument was a mortgage, and alleged that it was a deed absolute. Upon the hearing, the court found that said instrument was a mortgage, and that there was due to the defendant $583; and, as conclusions of law, that the mortgage should be foreclosed, that each party pay his own costs, and that each party pay one-half of the jury fee. That fee amounted to $72, and had been paid by the plaintiff. Judgment was thereupon entered foreclosing said mortgage, and ordering a sale of the mortgaged premises. From this judgment, defendant Robbins appealed, making the points that the finding that said instrument was a mortgage was not justified by the evidence, and that the judgment foreclosing the mortgage was erroneous. This court sustained the finding that the instrument was a mortgage, but held that the action was to redeem from the mortgage, that a foreclosure was not sought by either party, and directing that the decree should fix a reasonable time within which the plaintiff must pay the balance found due, and that, in default of such payment within the time limited, the action should be dismissed, and ordering that the decree be modified accordingly: Cline v. Robbins, 112 Cal. 581, 586, 44 Pac. 1023. Upon the going down of the remittitur, what is styled an "amended judgment" was entered, in which it was recited that a former judgment had been entered foreclosing the mortgage, the appeal therefrom, and the judgment that the decree be modified, and then proceeded to decree "that the judgment heretofore entered be modified by striking out all that part thereof which forecloses the mortgage, and the same is hereby stricken out, and it is further adjudged and decreed that the plaintiff pay to the defendant the sum of $583, together with interest at seven per cent per annum from June 12, 1895, within forty days after the entry of this amended judgment; that, upon the payment of such sum, within said time, the mortgage be decreed to be satisfied by this court; and, upon payment thereof, the defendant is ordered to duly make, execute and deliver to the plaintiff a deed of conveyance of the said mortgaged premises, and, if within the said forty days the whole of said money and interest shall not have been paid, then, upon motion of the defendant, this action shall be dismissed." Within the time

above limited, plaintiff's attorney tendered to defendant's attorney $590.60 in full payment of the amount due, and this tender was refused, upon the ground that it was $38.65 (the amount of half the jury fee, with interest) less than the amount of said judgment and interest. Plaintiff thereupon deposited the sum tendered with the clerk of the court for the defendant in satisfaction of the judgment; and the defendant thereupon moved the court to dismiss plaintiff's action, upon the ground that he had failed to comply with said amended judgment. This motion was denied, and from the order refusing to dismiss the action this appeal is taken.

It is contended by appellant that the amended judgment makes no reference to costs or jury fees, but requires that the full sum of $583, with interest, be paid. The former judgment, however, was only affected by the order of this court in the particulars specified. It was not reversed, and a new judgment ordered, but was modified in certain specified particulars, none of which referred to the costs of the action in the court below. It is further said by appellant that the original judgment as entered provided for the payment of said half of the jury fee out of the proceeds of the sale of the premises under the mortgage, and not out of the $583 found due to the defendant; in other words, that defendant was to "receive his five hundred and eighty-three dollars, and interest over and above the thirty-six dollars jury fee due to plaintiff." The decree in that respect was awkwardly drawn, but the intention of the court is apparent from the expression as to "one-half the jury fee, now due plaintiff," and the further direction "that out of the proceeds of said sale the commissioner retain his fees, disbursements and commissions on said sale, and pay to the plaintiff or his attorney out of said proceeds the sum of thirty-six dollars, jury fees, costs of this suit." If it had been the intention of the court that plaintiff should not be repaid by defendant one-half of the jury fee of $72, paid by plaintiff, there was neither necessity nor propriety in saying anything about it in the decree, while the conclusions of law expressly directed that "each party pay one-half of the jury fee." The whole proceeding was an equitable one, and as the question of costs in the court below was not raised upon the former appeal, and as no order was made by this court upon that question, the court below properly found that this disbursement made by the

plaintiff in the course of the action should be deducted from the amount found due the defendant, and that plaintiff's property should not be forfeited because of his refusal to pay to defendant money to which he was not equitably entitled.

It is further urged as "a more potent reason why this action should be dismissed," viz., that prior to the tender the plaintiff conveyed the property in question to his son, and, on the same day upon which the conveyance was made, he was adjudged an insolvent debtor upon his own petition. These facts were brought to the attention of the court by affidavit upon the hearing of the motion to dismiss the action. They were entirely immaterial. If the plaintiff was entitled to redeem, and by his tender effected a redemption, the defendant had no interest in the property to be affected by the conveyance; and, if no redemption was effected, the conveyance could not deprive him of the property; or if, as contended, the conveyance was a fraud upon creditors, it could only be so if redemption was in fact made, so that it became plaintiff's property; and in that case the creditors' remedy is not debarred, but is promoted, by the refusal of the court to dismiss the action. My conclusion is that the order appealed from should be affirmed.

We concur: Chipman, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

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## LILIENTHAL et al. v. BALLOU et al.

L. A. No. 413; November 30, 1898.

55 Pac. 251.

**Sale—Change of Possession.—Civil Code**, section 3440, providing that transfers of personal property by a person in possession or control thereof, unaccompanied by an actual and continued change of possession, shall be conclusively presumed to be fraudulent against the seller's creditors, does not apply to a transfer of property after the same is in possession of the sheriff under an attachment against the seller.

APPEAL from Superior Court, San Luis Obispo County.

Action by J. W. Lilienthal and others against S. D. Ballou and another. From a judgment for plaintiffs and from an order denying a new trial defendants appeal. Affirmed.

Wm. Shipsey for appellants; W. H. Spencer for respondents.

McFARLAND, J.—This action is to recover a certain stock of goods formerly owned by Phillips Bros. & Co. There was a trial by jury, and the verdict and judgment were for plaintiffs. Defendants appeal from the judgment and from an order denying a new trial.

The goods in question were attached at the suit of creditors of Phillips Bros. & Co., and were held by the sheriff under the attachment for several weeks. While the goods were thus in possession of the sheriff they were transferred by Phillips Bros. & Co. to the plaintiffs, who were trustees for all their creditors except the defendant Orman, who afterward attached the goods as the property of Phillips Bros. & Co., and Orman and Ballou, the sheriff who served Orman's attachment, are the defendants and appellants in this action.

A thorough examination of the record in this case shows that there is really only one question on this appeal to be determined, and that is whether the following instruction given by the court to the jury was correct or erroneous: "If you should find from the evidence that when the property in controversy was transferred to the plaintiffs by Phillips Bros. & Co. said property was not in possession of Phillips Bros. & Co., but was in the possession of the sheriff of this county, then it is not necessary for you to pass upon the question of whether or not there was an immediate delivery or actual or continued change of possession of the property. If, however, you should find that when said property was transferred it was in possession of Phillips Bros. & Co., then you must pass upon the question of immediate delivery and an actual and continued change of possession." If this instruction be held to be correct, then there are no other points, exceptions or specifications of error which need to be considered. We think that the instruction was correct. It is not absolutely perfect, because the words "or control" should have been used immediately after the word "possession," so as to make the clause read, "not in possession or control" of Phillips Bros.

& Co.; but, for the purpose of this case, the omission of the word "control" was immaterial. No point is made upon such omission. The theory of appellants on this point was, and is, that, notwithstanding the fact that the sheriff was in possession at the time of the transfer, still section 3440 of the Civil Code applied, and the transfer was invalid unless there was an immediate delivery and actual and continued change of possession of the goods, and they asked the court so to instruct. This theory would not have been affected by the word "control" in the instruction, nor is it pretended by appellants that the instruction would have been good if that word had been used. It is clear that section 3440 does not apply to the transfer involved in the case at bar. The part of that section necessary to be here construed is as follows: "Every transfer of personal property . . . . is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those," etc. We cannot insert words into the section, and as it stands it refers only to a transfer made by a person in possession or control of the property transferred; and in the case at bar the instruction in question assumes, and it is admitted, that at the time of the transfer from Phillips Bros. & Co. to respondents the property was not in the possession or control of the former, but was in the possession of the sheriff. We are not concerned with the suggestion that under this view certain creditors might gain preference over other creditors; such preference can be had, except where the law forbids it. Of course, actual fraud would vitiate a transfer, but there is no such question as that in this case. The provision of the statute with respect to actual and continued change of possession does not apply, under its express language, to a case where a party transferring the property is not in its possession. Williams v. Borgwardt, 119 Cal. 80, 51 Pac. 15, is a case directly in point; but, really, the language of the statute is too clear to leave any room for doubt on the subject. The judgment and order appealed from are affirmed.

We concur: Henshaw, J.; Temple, J.

## Ex Parte HENION.

Cr. No. 505; December 5, 1898.

55 Pac. 326.

**Habeas Corpus—Moot Cases.—Habeas Corpus cannot be Resorted** to, to obtain a speedy decision as to the validity of an ordinance, where petitioner is not in fact suffering imprisonment, or where the imprisonment terminates on the day of the hearing.[1]

APPEAL from Superior Court, Solano County.

Petition by A. C. Henion for a writ of habeas corpus. Discharged.

C. P. Stevens, T. E. Dunlap and J. A. Plummer for petitioner; Attorney General Fitzgerald for respondent.

PER CURIAM.—This is an application for a writ of habeas corpus. At the hearing, it was shown that the petitioner was not in fact suffering imprisonment, and that the case was in its nature a moot case, by which a speedy decision was sought to be obtained upon the question of the validity of an ordinance of Solano county. Moreover, it was shown that the alleged imprisonment of petitioner would this day come to an end, and the judgment be fully executed by lapse of time. The business of this court between bona fide litigants is of altogether too great a magnitude to warrant or even to excuse us in pretending moot cases. The writ is discharged.

[1] **Cited** in the note in 35 L. R. A., N. S., 885, on habeas corpus in case of bail, parole or voluntary surrender.

# PORTER v. LASSEN COUNTY LAND AND CATTLE COMPANY et al.

Sac. No. 459; December 8, 1898.

55 Pac. 395.

**Appeal—Necessary Parties.—A Defendant, Who Held a Second Mortgage,** conditioned that, if the first mortgage was foreclosed, his mortgage should not be foreclosed, by cross-complaint or otherwise, and who answered a foreclosure action, praying the application of surplus, if any, to his mortgage debt, and who was by the decree adjudged to hold a second mortgage, on which a certain amount of money was due, is a necessary adverse party, on whom notice must have been served of an appeal from such decree, though it merely directed the payment of the surplus into court to await a further order.

APPEAL from Superior Court, Lassen County.

Action by Benjamin F. Porter against the Lassen County Land and Cattle Company and others. There was a decree for plaintiff and defendant cattle company appealed. Dismissed.

Spencer & Raker for appellant; A. E. Bolton for respondent.

PER CURIAM.—This is an appeal by the defendant, the Lassen County Land and Cattle Company, from an order of the court below denying its motion for a new trial. With the final submission of the case here there was also submitted a motion by the respondent to dismiss the appeal upon the ground that the defendant George K. Porter was not served with notice of appeal. In our opinion, the motion to dismiss the appeal should be granted. The action was brought by the plaintiff, B. F. Porter, to foreclose a mortgage executed to him by the corporation defendant on the twenty-eighth day of January, 1893. The said George K. Porter was made a party defendant, it being averred in the complaint that he claimed some interest in the lands and premises mortgaged, which, it was alleged, was subsequent and subordinate to the mortgage of plaintiff. George K. Porter filed an answer, in which, after denying certain averments of the complaint as to the nonpayment of certain amounts due on plaintiff's

mortgage, he averred that subsequent to the date of plaintiff's mortgage, to wit, on January 22, 1894, the said corporation defendant executed to him a mortgage upon the property described in the complaint, as well as upon certain other property, to secure the sum of $16,061.50. This mortgage was set out in full in his answer, and it provided that, in the event of a suit brought by plaintiff to foreclose his mortgage, George K. Porter should not ask to have his mortgage foreclosed, by cross-complaint, or otherwise, and that he should not ask to have his mortgage foreclosed, except in a separate action brought by him. He averred in his answer that no part of the principal or interest of his mortgage had been paid, and prayed "that the proceeds of sale of the mortgaged premises over and above the amount found due to the plaintiff be applied to the payment of the amount found due to this defendant, and that he have such other and further relief as may be meet in the premises." The court found that a mortgage had been executed by the corporation to George K. Porter, as averred in his answer, to secure the said sum of $16,061.50, and that no part of the principal or interest thereof had been paid. It was further found and decreed that any balance that should remain after paying the amount due on plaintiff's mortgage, with costs, expenses of sale, etc., should be "paid into court to await the further order and judgment of said court." Appellant's notice of appeal was not addressed to, or served upon, the said George K. Porter. George K. Porter was an adverse party, upon whom the notice of appeal should have been served, within the rule declared by numerous decisions of this court: In re Castle Dome Mining & Smelting Co., 79 Cal. 246, 21 Pac. 746, and cases there cited; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. 951; Society v. Lewis, 111 Cal. 519, 44 Pac. 175. It was adjudged that he held a subsequent mortgage on the premises described in the complaint, and that a certain amount of money was due thereon; and, under the decision, he was entitled to have any surplus of the proceeds of the sale, over and above that necessary to satisfy the plaintiff's judgment, applied on his mortgage. He seemed to have been satisfied with the judgment, as he did not appeal from it, and he was interested in having his rights under the judgment maintained. A reversal would have altered his position, and left him without his right to

said surplus. He was a second mortgagee, with certain rights secured to him by the judgment. His position of advantage as to the surplus was not affected by the fact that the court in its decree did not expressly declare that he was entitled to the surplus. The surplus was ordered to be paid into court, "to await the further order and judgment" of the court, and he was entitled to have the surplus under such further order and judgment. He was, therefore, an adverse party, upon whom it was necessary to serve the notice of appeal in order to give this court jurisdiction thereof. The appeal is dismissed.

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## EDE v. CUNEO et al.

S. F. No. 905; December 9, 1898.

55 Pac. 388.

**Street Assessments.—The Street Improvement Act** (section 9), authorizing a second assessment where an action to foreclose a lien for street work is defeated by reason of a defective assessment, does not authorize a second assessment where such an action is defeated for want of an engineer's certificate.

**Street Assessment.—A Demurrer to a Complaint to Foreclose a** lien for street work, alleging that a second assessment had been made under the street improvement act (section 9), for the reason that the prior assessment and engineer's certificate were "never duly or properly or legally recorded," should be sustained for uncertainty, as the statement as to the defects in the first assessment is merely a legal conclusion.

APPEAL from Superior Court, City and County of San Francisco.

Action by William Ede against Joseph Cuneo and others. From an order sustaining a demurrer to the petition plaintiff appeals. Affirmed.

J. C. Bates for appellant; J. P. Langhorne for respondents.

HARRISON, J.—The complaint is in the ordinary form for the foreclosure of the lien of a street assessment and alleges that the contract for doing the work was entered into August 13, 1890, and completed within the time fixed there-

for, and that an assessment for the work was issued July 6, 1896. It alleges that on the 16th of November, 1891, the superintendent of streets issued an assessment for the work, with a warrant and diagram attached, upon which a suit was commenced, and in which a final judgment was entered against the plaintiffs therein, and that it appears by said final judgment that the plaintiffs were defeated by reason of the fact that neither the assessment, diagram, warrant nor engineer's certificates were duly or properly recorded in the office of the superintendent of streets; that within three months after the entry of said final judgment, upon the application of an interested party, the superintendent of streets made another assessment, with diagram and warrant attached, upon which a suit was subsequently brought, and in which a final judgment was rendered that the plaintiff was not entitled to recover thereon; that it appears by the final judgment rendered in the last-named action that the plaintiff was defeated by reason of the fact that the city engineer had never made any engineer's certificate of the work, and that the assessment, diagram, warrant or purported engineer's certificate had not been duly or properly or legally recorded in the office of the superintendent of streets; that within three months after the entry of this judgment the superintendent of streets made and issued the assessment, diagram and warrant upon which the present action is brought. It is alleged that the suit upon the second assessment was entitled "Joseph Wells, Assignee of Said Contract, Plaintiff, against J. W. McDonald, Defendant," but the connection of either of these parties with the subject matter of the suit is not shown. There is no direct allegation that the contract or the assessment was ever assigned to Wells, and it is alleged that Buckman and Perrine, assignees of Vincent, to whom the contract was awarded, did all the work of the contract. Neither is there any allegation that McDonald had any interest in the land assessed, while it is alleged that the defendants herein were the owners of said land during all the times of taking the proceedings for the improvement. To this complaint the defendants demurred upon the ground that it did not state facts sufficient to constitute a cause of action, and also upon the ground that it was uncertain in failing to show the particular defects, omissions and irregularities in the assessments upon which the court determined that the plaintiff was not

entitled to recover. The court sustained the demurrer, and from the judgment thereon in favor of the defendants the plaintiff has appealed.

Section 9 of the street improvement act provides: "Whenever it shall appear by any final judgment of any court in this state that any suit brought to foreclose the lien of any sum of money assessed to cover the expense of any street work done under the provisions of this act, has been defeated by reason of any defect, error, informality, omission, irregularity or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof, made to or recorded by said superintendent of streets, any person interested therein may at any time within three months after the entry of said final judgment" apply to the superintendent of streets, and have issued to him another assessment in conformity to law. The authority of the superintendent of streets to issue a second assessment, as well as the validity of the assessment thus issued, is purely statutory, and such assessment can be issued only under the conditions therein prescribed. The statute does not authorize a second assessment in all cases in which the plaintiff shall fail to obtain a judgment in his favor upon the prior one, but has specified certain grounds of his defeat as the only ones which will authorize the issuance of a second assessment, and has designated the evidence by which the fact and cause of his defeat is to be shown. It has not authorized a second assessment merely because the prior one did not create a lien upon the land assessed, or because there was an error, defect or omission in any other document or proceeding requisite to create a lien than "in the assessment, or in the recording thereof, or the return thereof, made to or recorded by the superintendent of streets"; and it has declared that the evidence upon which the superintendent of streets is authorized to issue a second assessment, and which is to be presented to him therefor, is a final judgment in a suit upon the former assessment, in which it will appear that the suit was defeated by reason of such defect. In Gray v. Lucas, 115 Cal. 430, 47 Pac. 354, it was said: "Under this provision of the statute the right to a second assessment does not exist, unless it 'appear' by the final judgment in a suit upon the prior assessment that the suit was defeated by reason of some infirmity in the 'assessment,' or in the recording thereof, or in some

matter connected with the return of the warrant. If the suit is defeated by reason of a defect or infirmity in any other step taken in the proceedings, or by reason of a lack of evidence, or failure to prove any other fact essential to a recovery, the statute does not apply." It is unnecessary to consider the defects alleged to have existed in the assessment originally issued for the work, since, unless the conditions required by the statute for the issuance of a second assessment existed at the time the superintendent made the assessment upon which the present action is brought, this assessment was unauthorized, and created no right of action or lien upon the property assessed. Whatever may have been the defects in the original assessment, a subsequent one had been issued, and it was necessary for the plaintiff to allege facts which would authorize the issuance of another, otherwise it would be assumed that the second one was correct; and, as against the pleader, it must be assumed that there were no other defects in regard to the second assessment than he has alleged. These are that in the suit of Wells against McDonald the plaintiff was defeated "by reason of defects, errors, informalities, omissions, irregularities and illegalities in recording said last-mentioned assessment, diagram, warrant and purported engineer's certificates, and the failure of the city engineer of said city and county to make any engineer's certificate for said work, in this: that it appears from said last-mentioned final judgment as follows: That the city engineer of said city and county had at the time of said last-mentioned judgment never made any engineer's certificate of said work; that neither said last-mentioned assessment, diagram, warrant nor purported engineer's certificates were duly, or properly, or legally recorded in the office of said superintendent of streets." The words used at the close of this allegation of the cause of the defeat, viz., "in this: that it appears from said last-mentioned final judgment," limit the allegation in general terms of the cause of the defeat to the defects thus enumerated, and show that the failure of the plaintiffs to recover judgment was not the result of any defect in the assessment, but from the fact that the city engineer had never made any certificate of the work. In Gray v. Lucas, supra, it was held that the certificate of the engineer is no part of the assessment, and that the mere want of such certificate did not constitute a defect in the "assessment" which would

authorize the superintendent of streets to issue a second assessment. A distinction is observed by the statute itself (section 9) between the several documents essential to the creation of a lien, each of which is to be complete in itself. In Dougherty v. Hitchcock, 35 Cal. 512, it was held that the assessment must be authenticated by the signature of the superintendent, and that his signature to the warrant attached thereto was insufficient. See, also, Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599. As the provision of section 9, above quoted, does not authorize the issuance of a second assessment for a defect or omission in respect to any other document essential to the creation of a lien than the "assessment," if we should hold that its provisions include defects or omissions in reference to other documents, we would be adding terms to the statute which the legislature has not seen fit to enact.

The allegation in the complaint that the prior assessment, diagram, warrant and purported engineer's certificates were "never duly or properly or legally recorded" in the office of the superintendent of streets, is the averment of a legal conclusion, and not of a fact. This allegation imports that the assessment was recorded, but whether it was "properly" or "legally" recorded was to be determined by the court upon the facts shown in reference thereto, and the opinion of the plaintiff as to the effect of these facts could not be substituted for the judgment of the court. He should have pointed out the defect in the record upon which he relies, in order that the court might determine whether it impaired its sufficiency. The demurrer upon the ground of uncertainty was also properly sustained. The plaintiff should have pointed out and specified the defects or omissions which appeared in the judgment as the ground upon which the suit upon the former assessment was defeated. The judgment is affirmed.

We concur: Van Fleet, J.; Garoutte, J.

## GRANGERS' BANK OF CALIFORNIA et al. v. SHUEY et al.

S. F. No. 910; December 15, 1898.

55 Pac. 682.

**Banking—Overdraft.—A Bank Took a Mortgage as Security** for an overdraft, and later a note for the amount due on the draft, as a matter of bookkeeping, but with the agreement that it was not a payment of the account. The mortgage recited that it was to stand as security for whatever indebtedness to the bank might result from the account at any particular period. Held, to justify a finding that the note was not given in final payment, and that the lien still subsisted.[1]

**Appeal.—Where Evidence is Conflicting on a Vital** question of fact, the appellate court cannot pass on the question of preponderance of the evidence.

APPEAL from Superior Court, Contra Costa County.

Action by the Grangers' Bank of California and others against J. A. Shuey and others. There was a judgment for plaintiffs, and defendant the Union Savings Bank appeals. Affirmed.

A. A. Moore and Thos. D. Corneal for appellant; E. S. Pillsbury and F. D. Madison for respondents.

CHIPMAN, C.—Foreclosure. Defendants J. A. Shuey and his wife, Lelia, on January 20, 1893, executed to plaintiff bank (hereinafter referred to as respondent) a deed of trust, intended as a mortgage, duly recorded January 25, 1893, to secure the overdraft of defendant J. A. Shuey. At that time this overdraft amounted to $6,387.30. On February 27, 1895, Shuey executed to defendant bank (hereinafter referred to as appellant) a mortgage on the premises included in the deed of trust given respondent, which was duly recorded March 29, 1895, actual notice of which came to respondent April 19, 1895. On June 10, 1895, this action was brought to foreclose respondent's mortgage, the amount secured thereby then being $6,136.19. Appellant, by its cross-complaint, put in issue the

[1] Cited in the note in 35 L. R. A., N. S., 88, on payment by commercial paper.

amount due respondent on the overdraft, and claimed that the lien of the respondent had been fully paid and satisfied. One of the items of respondent's account was a promissory note for $5,500, given to respondent August 5, 1893, on which date its overdraft account was credited by this amount. The running account in respondent's ledger "showed the following credit: '1893, August 5th, by note secured by deed of trust, $5,500'; and the following debit item: '1895, May 2d, note and int. of August 5, 1893, $5,883.80.' " The contention of appellant now is that this $5,500 note (amounting May 2, 1895, to $5,883.80) was given in final payment, and to that extent respondent's lien was discharged; and the only question presented is whether such was the effect of the note.

It appears in evidence that respondent took this note in compliance with certain previous resolves of the clearing-house of San Francisco to abandon and discontinue the practice of allowing current overdraft accounts. Respondent was a member of the clearing-house, and agreed with its other members to carry out the new policy. This agreement, with some other facts and circumstances, is relied upon by appellant as showing that the note was taken in payment of the overdraft, thus discharging respondent's lien, and that the court erred in finding that the amount was secured by respondent's mortgage. Counsel on both sides agree to the well-settled proposition of law that the taking of a note for a pre-existing debt is not payment unless it be expressly agreed that it shall be so considered: Savings etc. Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922; Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727. The real question in the case, therefore, resolves itself into one of fact.

Mr Montpellier, president of the respondent bank, testified that "at the time the note was taken it was expressly understood and agreed that it should not be considered as payment, in whole or in part, of the current account; that the note was a matter of accommodation for the books of the bank, and was secured by deed of trust." He was asked on cross-examination if he stated these things to Mr. Shuey in words, and he answered: "Yes, sir. Q. Did you state all those things to Shuey? A. Yes, sir, certainly; distinctly and clearly." It also appeared from the evidence that when Shuey gave the mortgage to appellant he informed the president of the appellant bank, and he also told its vice-president and cashier,

that the respondent had a deed of trust to secure this note. Respondent's deed of trust contained the provision that "this conveyance shall stand as security for whatever indebtedness to the bank may be the result of said account at any particular period."

There was evidence to justify the court in finding that the note was not given in final payment, and in treating the overdraft account as unchanged. Having so concluded, the court very properly held that the lien still subsisted and was prior to appellant's lien. The principle is correctly stated in Jones on Mortgages, at page 924: "No change in the form of indebtedness or in the mode of payment will discharge the lien. A mortgage secures the debt, and not the note or bond or other evidence of it. Nothing short of the actual payment of the debt, or an express release, will operate to discharge the mortgage. The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note or by giving a different instrument as evidence of the debt." The most that can be claimed by appellant is that the evidence is conflicting upon the vital question of fact here involved. In such case we are not at liberty to pass upon the question of preponderance of the evidence. The judgment and order should be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## McDONALD v. MAYOR ETC. OF CITY OF PLACERVILLE.

S. F. No. 938; December 16, 1898.

55 Pac. 600.

**Judgment—Default.—Where Plaintiff Sues on a Judgment,** joining as defendants persons claiming adverse rights therein, demanding, in addition to the recovery on the judgment, a determination that the adverse claimants have no interest therein, and judgment is rendered against him on the latter contention, he is not entitled to judgment against the judgment debtor who is in default, under Code of Civil Procedure, section 585, allowing judgment by default in actions arising on contract for the recovery of money only.

APPEAL from Superior Court, City and County of San Francisco.

Action by Marion J. McDonald against the mayor and common council of the city of Placerville. Judgment for defendant and plaintiff appeals. Affirmed.

Edward Lynch and W. G. Bonta for appellant; C. W. Cross for respondent.

PER CURIAM.—The plaintiff sued on a certain judgment against the city of Placerville, averring himself to be the owner of an undivided one-half thereof, and joining as defendants several persons alleged to claim rights in the same adverse to him. The court below held that he had no interest in the judgment, and its decision was affirmed on a former appeal in this case, entitled McDonald v. Cutter, 120 Cal. 44, 52 Pac. 120. The only point made here is that plaintiff should have recovered against the city of Placerville, which suffered default. Plaintiff, however, demanded relief in addition to a recovery of money due on the judgment, viz., a determination that the defendant Cutter has no interest in the same; and this on grounds such that a failure to sustain his case in that particular necessarily defeated it as to all the defendants. He was therefore beyond the provision of the statute allowing judgment by default in actions arising on contract for the recovery of money or damages only: Code Civ. Proc., sec. 585. This appeal seems to us frivolous. The judgment is affirmed.

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## SMITH v. WILLIAMS et al.

Sac. No. 147; December 16, 1898.

55 Pac. 600.

**Water Rights.—A Deed by a Prior Appropriator of Water** conveyed "all of his right to the use of all the waters of D. creek. Said waters to be taken out at a point . . . . about one mile above the head of S.'s old ditch, and tapping said creek where the B. Co. taps said D. creek. . . . . To have and to hold . . . . the first right to the use of all the waters" thereof. The grantor at that time owned five ditches tapping the stream below the named point of inflow, through

which ditches he thereafter continued to divert water, with the grantee's acquiescence. Considerable water still flowed in the stream below the point named, it being from seepage, springs and other sources. Held, that the intention was to convey a first right only to the point mentioned, and, hence, that the waters below did not become subject to appropriation.

**Witness.—It is not Error to Exclude a Question Calling for a mere repetition of testimony.**

APPEAL from Superior Court, Siskiyou County.

Action by William H. Smith against William Williams and Jacob Templey. From a judgment for plaintiff and an order denying a new trial defendant Templey appeals. Affirmed.

Warren & Taylor and T. M. Osmont for appellant; James F. Farraher for respondent.

VAN FLEET, J.—Appeal by defendant Templey from the judgment, and an order denying a new trial. The action was to enjoin defendants from diverting water from a small stream in Siskiyou county, known as "Ditch Creek," and for damages for such diversion. Plaintiff's claim was the exclusive right by prior appropriation to the waters of the stream, to the extent of six hundred inches, measured under a four-inch pressure, "when there is that quantity therein; and, when there is not such quantity, then all of the waters" of the stream "which rise or flow therein or thereinto between the point where the present ditch of the Blue Gravel Mining Company taps said creek, and a point about two miles below, on the line of said creek, where the present lower ditch of plaintiff taps said creek." He averred a wrongful diversion by defendants of fifty inches of the water at a time when there was less water in the stream than the maximum quantity to which he was entitled, to his damage in the sum of $350. Defendant Templey set up the right in himself by appropriation to "about twenty inches" of the water of the stream, and denied the diversion of any water belonging to the plaintiff, or any damage. The court found that plaintiff was entitled to the exclusive use of the waters of the stream, to the extent of five hundred inches; that defendant Templey, in June, 1893, forcibly took possession of one of plaintiff's ditches and diverted through the same about fifty inches of water, and continued such diversion up to October, and again

in like manner diverting it from May to October, 1894; that during the periods of such diversion there was less than five hundred inches of water in the stream; that plaintiff was damaged in the sum of $250. Judgment was entered enjoining the diversion, and for the damages found.

The main point urged is that the findings are not sustained by the evidence. There is evidence tending substantially to establish the facts as found by the court. The finding that plaintiff "is now, and for upward of twenty years last past has been the owner and entitled to the exclusive use to the extent of five hundred inches, measured under a four-inch pressure, when there is that quantity, and when there is not such quantity, then to all of the waters flowing in Ditch creek, in Cottonwood mining district, county of Siskiyou, state of California, which rise or flow therein between the point where the present ditch of the Blue Gravel Mining Company taps said Ditch creek, and a point about two miles below, on the line of said creek, where the present lower ditch of plaintiff taps said creek," presents the principal point of attack. It is contended that the finding is wholly negatived by the fact, as claimed by appellant, that prior to the bringing of the action plaintiff had conveyed away all his rights and interest in the waters of Ditch creek. This claim is based upon the fact that in December, 1888, plaintiff made a deed to one McFarland, whereby he conveyed to the latter "all of his right to the use of all the waters of Ditch creek. Said waters to be taken out at a point in said creek about one mile above the head of William H. Smith's old ditch, and tapping said creek where the Blue Gravel Mining Company's ditch taps said Ditch creek." "To have and to hold, all and singular, the first right to the use of all the waters of said creek." We think this deed was correctly construed by the court below as conveying only plaintiff's rights to the quantity of water mentioned, taken out at the designated point, and as leaving unaffected in plaintiff his rights in the stream below that point. This intention is evident, not only from the language of the instrument, but by the practical construction put upon it by the parties to the deed. Plaintiff at the date of the conveyance owned some five ditches tapping the stream at points below the point of diversion specified in the deed to McFarland, through which he has since continued to divert waters from said creek with-

out interference or adverse claim from his grantee, but with his knowledge and acquiescence. Plaintiff's grantee has taken the water from the stream by means of the same dam which existed in the stream at the point of his diversion when the deed was made; and there has since continued to flow below said dam a considerable quantity of water, part of which escapes past said dam, and part by seepage from the Blue Gravel Company's ditch, and part of which comes into the streams from springs and other sources below said dam; and plaintiff's right to the use of this water has never been questioned by his grantee, nor by anyone else other than appellant. The claim of the latter was based upon the theory that plaintiff had parted with all his rights in the stream; that all the water that flowed below the point of diversion made by plaintiff's grantee was seepage water, which was unappropriated, and which appellant was therefore entitled to take. The court properly found against this claim.

The other points call for no particular notice. There was no material error in sustaining plaintiff's objection to the question asked him as to the damage done him. It had been clearly answered once, and could not be made stronger by repetition. Judgment and order affirmed.

We concur: Harrison, J.; McFarland, J.; Garoutte, J.

I dissent: Beatty, C. J.

TEMPLE, J.—I dissent. Plaintiff claims exclusive right by appropriation to six hundred inches of water, or, when there is not that quantity, then to all the water in the creek, between two designated points on the creek. He avers that he now is, and for twenty years last past has been, the owner of, and entitled to the exclusive use of, said water. He charges that defendants forcibly took possession of one of his ditches June 15, 1893, and diverted, and continue to divert, fifty inches of water, to his damage in the sum of $300, and that they threaten to continue such diversion. Templey denied all the material allegations of the complaint, and set up a right in himself, by appropriation, to twenty inches of water, "being seepage water from a ditch taking all the waters of Ditch creek, in Cottonwood mining district, and extending from Ditch Creek to the 'Blue Gravel Mining Claim,' so called." Plaintiff testified at the trial that he

owned five ditches by which water was taken from Ditch creek, and in 1878 he put upon record a notice describing his several claims to water. He also testified to the use of water from these various ditches down to the year 1892. In the notice, posted and recorded in 1878, he says: "Take notice that I own three ditches now taking waters of Ditch creek, a tributary of Cottonwood creek, and upon which this notice is posted,—one of them called the 'Crawford Ditch,' one the 'Haserick Ditch,' and the other constructed by me in 1870 to turn waters from this creek to the Steve Oysler ditch; and I claim the first right to the waters of this creek for said ditches to the full capacity, which ordinarily is all of the waters of this creek. I now claim surplus water in high waters, after said ditches are supplied, and the waters below said ditches, to the extent of five hundred inches, under a four-inch pressure," etc. There was no evidence tending to prove any later appropriation by plaintiff. The court found "that plaintiff above named is now, and for twenty years last past has been, the owner, and entitled to the exclusive use, to the extent of five hundred inches, measured under a four-inch pressure, when there is that quantity, and, when there is not such quantity, then to all the water flowing in Ditch creek," etc. In 1888 the plaintiff made a conveyance to one McFarland, in which it is recited that in consideration of the sum of $6,000, and other considerations, the party of the first part "does by these presents bargain, sell, convey and confirm unto said party of the second part, and to his heirs and assigns, forever, all of his right to the use of all of the waters of Ditch creek. Said waters to be taken out at a point on said creek about one mile above the head of the Wm. H. Smith's old ditch, and tapping said creek where the Blue Gravel Mining Company's ditch taps said Ditch creek, in the Cottonwood mining district, county of Siskiyou, state of California. To have and to hold all and singular, the first right to the use of all of the waters of said creek, together with all rights appurtenant thereto," etc. The appellant contends that by this deed plaintiff parted with all his right to the waters of Ditch creek, and as there was no evidence tending to show that plaintiff had, by appropriation or otherwise, subsequently acquired any water rights in the stream, and, furthermore, as the court expressly based its finding in favor of plaintiff upon rights which had belonged to plain-

tiff for twenty years, the finding is wholly without support from the evidence. It seems that there was already a dam at the point indicated, and that the Blue Gravel miners were taking water for these mines. The deed was for the owners of that mine, or some of them; and it is argued that the deed was merely intended to settle and assure their right to take all the water at that point, and for their mine. A contrary intent is indicated in the deed, which provides that the grantee shall not sell water for one particular purpose. Whether this attempted limitation be valid or not, it shows that the use of the water was not to be confined to working the mine. That the deed conveys all the rights of the grantor is so plainly expressed that construction is neither called for nor proper. It is twice expressed without qualification: "All of his right to the use of all the waters of Ditch creek," and "the first right to the use of all the waters of said creek, with all rights appurtenant thereto." There being a clear grant of the water and water rights, a condition which would prevent the grantee from the full enjoyment of the estate granted would be void as repugnant; also, under section 1070 of the Civil Code: Wilcoxson v. Sprague, 51 Cal. 640; McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566; Dodge v. Walley, 22 Cal. 225, 83 Am. Dec. 61. The case of Maker v. Lazell, 83 Me. 562, 23 Am. St. Rep. 795, 22 Atl. 474, is a very instructive case on this subject. The cases are collated and reviewed, and the objection that the rule will sometimes defeat the intention plainly manifested is answered.

I think, however, that this language in the deed cannot be regarded as a limitation or as a condition. As to limitations and conditions, the language of a deed must be construed strictly against the grantor. It is otherwise as to a reservation: Civ. Code, sec. 1069. By a reservation the grantor reserves to himself some right or property which did not before exist, such as rents and easements. An exception withdraws from the operation of the deed some part of the subject matter of the conveyance. However construed or understood, the statement that water is to be taken out at a certain point cannot be a reservation. And it is equally plain that it is not an exception. It is claimed that it must be construed as a grant only of such water as could be diverted at the point mentioned. Such conclusion is against the obvious and unambiguous language of the deed. All of plaintiff's appro-

priation of water was from points below the Jillson's or Blue Gravel dam. He testified, and, indeed, the very reason of the contention is, that a great deal of water percolated into the stream below the dam. This water, so far as included in his appropriations, certainly passed by his deed. But he cannot sell the right to take water from the stream at a point above his appropriation, and still maintain, as against other appropriators, his water rights below. If he had not authorized the diversion, there might have been water enough for all. And, if the water diverted does not come out of his water right, how could he sell it? Again, Smith did not own the stream, or its bed or banks. It does not appear that he was a riparian proprietor on the stream. He had no power to fix the point of diversion, nor any apparent interest in the question. The grantee acquired title to the water from him, but could not also acquire a right to build a dam at any point. I think the finding in favor of the plaintiff's right to the water unsupported by the evidence.

The plaintiff, in his complaint, charged that the defendants forcibly and against his consent took possession of a ditch belonging to plaintiff, and through it diverted from Ditch creek fifty inches of water which belonged to the plaintiff. Appellant denied plaintiff's right to any water, and also his ownership to the ditch, and that he at any time diverted any water whatever from the creek, except what seeped through the dam and from the Jillson ditch, and averred that he claimed by appropriation twenty inches of water, all of which was seepage water from the Jillson ditch, but was not taken by him from Ditch creek. Jillson, as well as Templey and Williams, testified upon this point favorably to defendant. The court, however, found this issue, also, for the plaintiff. I can find no direct evidence in the record to the effect that appellant ever took any water from Ditch creek except as above stated.

Templey and his witnesses testified that he had dug a ditch below the Jillson ditch, and that all the water he took came by percolation from that ditch. Upon this it is contended that, upon the construction of the deed claimed by plaintiff, this was water which had been taken out of the stream at the point mentioned, and, therefore, water which he had sold. This would present the question whether an appropriator can prevent other parties from taking from the stream water

which, left undisturbed, would percolate into the stream, and help to furnish the quantity to which he had acquired a right by appropriation. As this case now stands, it is not necessary to determine what the respective rights of the parties would be under such circumstances. It may possibly not be material upon a new trial, and, as it is an important question, which is involved in several other cases, I think it better that it should be passed for the present. I think the judgment and order should be reversed.

I concur: Henshaw, J.

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## GRAY et al. v. RICHARDSON.

S. F. No. 941; December 16, 1898.

55 Pac. 603.

**Street Assessments.—Street Improvement Act, Section 9, Authorizing** a second assessment where a suit to foreclose a lien for street work has been defeated by some defect in the prior assessment, does not apply when such a suit is defeated by any defects other than in making the assessment.

APPEAL from Superior Court, Marin County.

Application for mandamus by George T. Gray and others against George L. Richardson, as superintendent of streets. From an order denying the application and a motion for new trial plaintiffs appeal. Affirmed.

Fisher Ames for appellants; E. H. Gogen and E. B. Mahon for respondent.

HARRISON, J.—The plaintiffs seek by this proceeding a writ of mandate compelling the defendant, as superintendent of streets in the city of San Rafael, to issue to them an assessment for certain street work done by them in that city. A contract for doing the work was awarded to the assignor of the plaintiffs, and, after the work had been completed to the satisfaction of the superintendent, an assessment therefor, with warrant and diagram attached, was made and issued to said assignor in February, 1894. After its issuance, the assessment and warrant were assigned to the plaintiffs, and they brought actions thereon to foreclose the lien of said as-

sessment against certain parcels of the land that had been assessed. In these actions they were nonsuited, and judgment rendered in favor of the defendants therein. The present proceeding is instituted to obtain another assessment for the work, under the provisions of section 9 of the street improvement act. The superior court denied the application, and the plaintiffs have appealed therefrom.

Section 9 of the street improvement act provides: "Whenever it shall appear by any final judgment of any court in this state that any suit brought to foreclose the lien of any sum of money assessed to cover the expense of any street work done under the provisions of this act has been defeated by reason of any defect, error, informality, omission, irregularity or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof made to or recorded by said superintendent of streets," the superintendent of streets may issue a second assessment therefor. In Gray v. Lucas, 115 Cal. 430, 47 Pac. 354, we had occasion to consider this provision of section 9, and we there said: "Under this provision of the statute, the right to a second assessment does not exist, unless it appear by the final judgment in a suit upon the prior assessment that the suit was defeated by reason of some infirmity in the 'assessment,' or in the recording thereof, or in some matter connected with the return of the warrant. If the suit is defeated by reason of a defect or infirmity in any other step taken in the proceedings, or by reason of a lack of evidence, or failure to prove any other fact essential to a recovery, the statute does not apply." In the present case the court finds "that it does not appear by said judgments, or any of them, or by any final judgment entered in any of said actions, that said suits, or any of them, brought to foreclose the lien of or for any sum of money assessed to cover the expenses of said street work, was or has been defeated by reason of any defect, error, informality, omission, irregularity or illegality in any assessment made or issued, or in the recording thereof, or in the return thereof made or recorded by the superintendent of streets." No exception is taken to the correctness of this finding, or the sufficiency of the evidence to sustain it, and it follows that the superintendent was not authorized to issue a second assessment. The judgment and order are affirmed.

We concur: Garoutte, J.; Van Fleet, J.

## THOMSON-HOUSTON ELECTRIC CO. v. CENTRAL ELECTRIC RY. CO.

Sac. No. 389; December 20, 1898.

55 Pac. 777.

**Agency.—Plaintiff was to Act as Purchasing Agent** for defendant, but was to assume no responsibility for the satisfactory working of the apparatus purchased. The contract contemplated that plaintiff should pay for the apparatus, and be repaid by defendant in a lump sum, which was to include all supplies. The apparatus proved defective, and defendant notified plaintiff not to pay therefor until an adjustment was reached, stating that it had claims on other purchases against the seller almost equalling the entire cost, to which plaintiff's agent agreed, and unsuccessful attempts were made to adjust defendant's claims extending over several months, and until after the insolvency of the seller. In an action for the price, plaintiff's treasurer and the seller testified that plaintiff paid for the apparatus soon after delivery, and before the notice of defect. Held, that the agreement to withhold payment by plaintiff's agent, who did not know payment had already been made, did not prevent recovery, since it was without consideration.

APPEAL from Superior Court, Sacramento County.

Action by the Thomson-Houston Electric Company against the Central Electric Railway Company. From a judgment for defendant and from an order denying a new trial plaintiff appeals. Reversed.

Page & Eells for appellant; Johnson & Johnson for respondent.

CHIPMAN, C.—Action to recover the sum of $1,100, the contract price of four so-called Tripp trucks, furnished by plaintiff to defendant under written contract executed March 19, 1892. The cause was tried by a jury, and defendant had the verdict and judgment thereon. The appeal is from the judgment and from the order denying motion for new trial. The pleadings are verified.

Plaintiff is a Connecticut corporation, transacting business in San Francisco and other places through branch agencies. The manager of the San Francisco branch was Thomas Ad-

dison, with authority to make the contract. Plaintiff proposed that defendant purchase quite a large lot of electrical and other supplies suitable for defendant's use, and the proposal was accepted. The part of the contract now in question was as follows: "We propose to furnish four (4) latest improved roller-bearing Tripp trucks, you to guaranty that the above trucks shall not cost us to exceed two hundred and seventy-five dollars each f. o. b. cars Boston, Mass. In furnishing said trucks, however, it is agreed and understood that we act only as your agent in the matter, assuming no responsibility for their proper or satisfactory working, or for any delays in delivery of same, nor for any costs or expenses growing out of suits for alleged infringements of patents." The clause as to payment was for a gross sum ($10,000) for all the supplies "thirty days after the same has been delivered to you as above agreed upon, ready for successful operation." The complaint alleges that plaintiff fully performed all the conditions of the contract, including the purchase from the Tripp Manufacturing Company of, and payment to it for, the trucks in question. Defendant denies the purchase by plaintiff as alleged, and the payment by it to Tripp company; avers as a separate defense that plaintiff, as special agent of defendant, received the trucks from the Tripp company, and that plaintiff was authorized to do nothing else in connection with said trucks; that upon receipt of the trucks by defendant it notified plaintiff of a claim defendant had against said Tripp company which defendant desired to offset against said Tripp company for the purchase price of said trucks, all of which plaintiff knew before it paid said Tripp company as alleged in the complaint, and, if such payment was made by plaintiff, it was in violation of its authority; that said Tripp company at the time of said alleged payment was, and ever since has been, insolvent; and by reason of said payment, if made, defendant has been damaged $1,187. A second separate defense by way of counterclaim and offset is pleaded, alleging an indebtedness of Tripp company to defendant of $1,187 for money paid and expended by defendant in the repair and alteration of Tripp trucks purchased by defendant from said Tripp company within two years last past, of which claim plaintiff, at all times mentioned in the complaint, had knowledge; that plaintiff was acting only as special agent of defendant, and was

instructed by defendant not to pay $1,100, or any part of it, to the Tripp company, and that any payment made by it was without authority, and in violation of the agency and its instructions; avers that defendant has been prevented from collecting its said claim of $1,187, or offsetting the same by plaintiff's payment of said $1,100, and to defendant's damage.

1. Appellant contends that the evidence is insufficient to justify the verdict. By the terms of the contract, plaintiff became the agent of defendant to purchase the trucks, but no responsibility was to attach to the agent for the proper and satisfactory working of the trucks, nor for delays in the delivery. The cost was included in the gross sum to be paid for the entire equipment, which was $10,000; and defendant agreed to pay this sum "thirty days after the same has been delivered . . . . ready for successful operation." The words "successful operation" had reference to the other equipment, and not to the trucks, for it was especially agreed that plaintiff assumed no responsibility for their proper working. These trucks were to be purchased by plaintiff and paid for by plaintiff, for it agreed to furnish them; and defendant was to pay plaintiff, and not the Tripp company. The agency feature of this part of the contract was introduced to relieve plaintiff from liability as to the proper working of the trucks and as to delay in delivery, and properly so, because plaintiff had no interest or profit in these items. The evidence is uncontradicted that plaintiff gave the order to the Chicago branch, and the trucks were ordered by the Boston branch, and were delivered to that branch June 29, 1892. The bill reached plaintiff's Boston branch July 6th, and August 4th a statement of account of plaintiff was rendered by the Tripp company, and on August 5th the trucks were paid for by the Boston branch. Notice of this payment was not sent to the San Francisco branch. When the trucks were shipped to Sacramento does not appear, but it does appear that they were first used or examined about September 1st. Some repairs were found to be necessary upon them, and on September 7th defendant wrote the San Francisco branch not to pay the Tripp company in full until defendant made settlement with plaintiff. September 8th Dr. Addison wrote: "We cheerfully comply with your request, at the same time asking you to complete the repairs as promptly as possible, and

give us a full account of the same, together with costs." September 30th defendant sent account of charges "in perfection of trucks purchased from you for our use and account," charging plaintiff $134.34. On October 1st Dr. Addison replied, and, among other things, said: "While we should be glad to continue to act as your agent in this matter, if you so desire, and forward this [the account] to the Tripp people, yet we should prefer to have you take it up yourselves, and fight it out. You will note by our contract, dated March 19, 1892, that we simply act as your agent in this, and do not assume any responsibility whatever for these trucks. For this reason we return these bills to you, and ask you to take the matter up directly with the Tripp people." October 3d defendant replied: "We will do as requested; therefore do not pay the Tripp Manufacturing Company anything on these trucks until we can get this adjusted." On the same day (October 3d) Dr. Addison wrote to the Boston house, calling attention to the claim of defendant of $134.34 for repairs of these trucks, and, at the request of defendant, suggesting "that you defer settlement for these trucks until the same is adjusted with the Central Electric Railway Co.," and disclaiming responsibility for the trucks not working. October 11th the San Francisco house received a reply to its letter of October 3d, from the Boston branch, stating: "We will defer settling with the Tripp company until this matter is arranged. We suppose you will secure a claim from the railway people covering the expense incurred by them, which we will submit to the Tripp company before making settlement." The evidence of defendant was that there was no claim against the Tripp company on account of these four trucks except the $134.34. But it appears that defendant had purchased other trucks directly from the Tripp company, the satisfactory working of which that company had guaranteed. Defendant made certain necessary repairs on these latter trucks, and on October 10th defendant wrote the San Francisco branch, again asking that the Tripp company be not paid for the four trucks, as the Tripp company owed defendant "nearly enough to balance the account," but sending no items of account. Several other letters were exchanged between defendant and Dr. Addison on the subject, showing that defendant was endeavoring to effect a settle-

ment with the Tripp company without much success, and asking that plaintiff do not pay the Tripp company for the trucks; and on November 7th Dr. Addison wrote to defendant: "If you feel that you cannot settle it, send the account to me, and I will see what can be done, but of course cannot take any responsibility for such settlement." Defendant continued its efforts to settle with the Tripp company direct. February 17, 1893, Dr. Addison asked defendant if it could not, in making its settlement with the Tripp company, collect a claim of his company against the Tripp company for $228. It does not appear that defendant ever notified the plaintiff of its claims against the Tripp company other than those on the four trucks, except in the letter of October 10th, as already stated. Finally, February 20, 1893, Dr. Addison wrote the defendant that he was advised by the Boston office that the Tripp company had made an assignment for the benefit of its creditors, and that, unless a certain proposed compromise was accepted, his company would not get over ten or twenty per cent of its claim, and adds: "I give you this information in case you should desire to take advantage of the same." This brought the matter to a focus, and defendant wrote to plaintiff, March 4th, inclosing balance as settlement of account to February 1, 1893, and added: "The eleven hundred dollar item, as shown in your statement February 28th, is wholly incorrect, as the T. H. [Thomson-Houston] contract is settled so far as you are concerned, we having (by your own suggestion) taken up the matter of settlement with the Tripp Manufacturing Company for the trucks. We hope you will save us further correspondence over this matter," etc. March 6th, Dr. Addison replies, and for the first time informs defendant that plaintiff had already paid the Tripp company for the trucks, claiming that defendant owed plaintiff for them, and stating that, "if the Tripp company had not failed, this matter would be easier of adjustment than it is." The remaining correspondence consists of restatements of former letters, and the writers' construction of their meaning. It will be observed that all this correspondence occurred after the Tripp people had been paid. That they were paid by the Boston house on August 6, 1892, is undisputed, except as it may be otherwise inferred from this correspondence. We think the sworn testimony of the treasurer of the Boston

branch of plaintiff, and also that of the manager of the Tripp company, may be consistently accepted as true, notwithstanding the ignorance of the fact of the San Francisco house and of the person in charge of the correspondence at Boston. We see no necessary conflict between the fact of payment sworn to and the subsequent correspondence.

The repairs upon trucks purchased directly by defendant from the Tripp company, or other items of charge of defendant against that company, with which plaintiff had nothing to do, and which items were never furnished plaintiff, had no connection with the defendant's contract with the plaintiff. When defendant asked plaintiff to withhold payment for the four trucks until defendant could adjust its differences with the Tripp company as to matters of no concern to plaintiff, it was asking something it had no right to ask under the contract. What plaintiff did in respect of those claims was voluntary, and without consideration. Even as to the four trucks, plaintiff, by the terms of the contract, was to assume "no responsibility for their proper and satisfactory working, or for any delays in delivering the same." The contract required plaintiff to make the purchase of four trucks, and contemplated that plaintiff should, in the first instance, pay for them; and there was no restriction upon plaintiff as to when it should pay for them. The very matter as to which repairs became necessary was in terms taken out of plaintiff's responsibility. It was guaranteed by defendant that the trucks should not cost plaintiff "to exceed two hundred and seventy-five dollars each, f. o. b. cars Boston, Mass.," which was the price paid by plaintiff; and this price was included in the gross sum of $10,000 to be paid for the entire equipment by defendant.

As to the knowledge of the insolvency of the Tripp company, there is no evidence that plaintiff knew it until after the assignment for the benefit of the creditors in February, 1893, which fact was promptly communicated to defendant; and there is no evidence that the Tripp company was insolvent at the times alleged in the answer.

2. We do not feel called upon to examine the alleged errors of law occurring at the trial in giving instructions and refusing or admitting evidence. Many, if not all these, are connected with the question of plaintiff's liability for

the claim of defendant for $1,187 arising out of repairs to trucks not purchased through plaintiff, as to which we have held that plaintiff incurred no liability. The judgment and order should be reversed and the cause remanded.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded.

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## MEGGINSON v. TURNER.

S. F. No. 808; December 20, 1898.

55 Pac. 795.

**Appeal.—A Finding on Conflicting Evidence** cannot be disturbed.

**Bills and Notes.—Where Defendant in an Action on Notes** alleges the conveyance to plaintiff of property as security, and asks for an accounting, it is not error to render judgment dismissing the cross-complaint, where the evidence shows that plaintiff holds the property, not as security, but as a naked trustee, and is ready to surrender the same.

APPEAL from Superior Court, City and County of San Francisco.

Action by Lawrence Megginson against J. F. Turner. From a judgment for plaintiff and an order denying a motion for new trial defendant appeals. Affirmed.

G. Gunzendorfer (Naphtaly, Freidenrich & Ackerman of counsel) for appellant; S. C. Denson for respondent.

CHIPMAN, C.—Action to recover the amount due on certain promissory notes. Plaintiff had judgment, from which, and from an order denying motion for new trial, defendant appeals.

Defendant, in his answer, by way of cross-complaint, claimed that he had conveyed to plaintiff certain real and

personal property as security of these notes, and asked for an accounting, and that he be allowed to redeem. He does not allege that plaintiff has sold any of this property or converted it. Plaintiff denied that he held any of defendant's property as security, and averred that whatever title he held was as trustee and in trust for defendant, which he stood ready to reconvey. The court found the due execution of the notes by defendant, and the amount due thereon, as to which the evidence is sufficient to justify the finding. It also found that the notes were not secured by any of the real or personal property conveyed by defendant to plaintiff as claimed by defendant, "but such properties as were conveyed to plaintiff were transferred to and held by him as trustee for the defendant." In its judgment the court dismissed defendant's cross-complaint.

Appellant contends that the court should have found as to the value of the properties conveyed to plaintiff by defendant, and should have adjusted the rights of the parties as to all the matters put in issue. The evidence as to the character in which plaintiff held the title to the property of defendant was conflicting. There was evidence tending to show that plaintiff did not hold the title as security for the debt, and the finding upon that issue cannot be disturbed. When the court found that plaintiff held none of defendant's property as security for the debt, it became immaterial, under the pleadings, for the court to find the value of this property. There was no occasion for an accounting, as defendant did not allege or claim that plaintiff had disposed of any of the property or converted any of it to his own use or benefit. There was no right of redemption involved, because the court found, upon sufficient evidence, that the property was not held as security. The case simply stated is this: Defendant owes plaintiff money on certain promissory notes. Plaintiff holds certain property belonging to defendant, not as security, but as a naked trustee, which he avows a willingness to surrender to defendant. We cannot see that the court could have done otherwise than to give plaintiff judgment, and dismiss defendant's cross-complaint, leaving defendant to such remedy as he may elect to pursue should plaintiff refuse to surrender defendant's property. Neither the pleadings nor the facts warranted

any other judgment than that rendered. The judgment and order should be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## SCANLAN v. SAN FRANCISCO AND SAN JOAQUIN VALLEY RAILWAY COMPANY.

Sac. No. 393; December 23, 1898.

55 Pac. 694.

**Judicial Notice—Mathematics.—Under Code of Civil Procedure,** section 1875, subdivision 8, authorizing courts to take judicial notice of the laws of nature, the court judicially knows the rules of mensuration by which the cubic contents of an irregular prismoidal body are ascertained.

**Contracts—Engineer's Estimate.—Where a Contract for Constructing a Railroad** embankment provided that additional dirt, not exceeding a certain quantity, should be added for shrinkage, the exact percentage to be specified by the company's engineer, and that payment for such embankment should be made by measurement of the material in the embankment, excluding that added for shrinkage, the amount designated by the engineer to be added for such shrinkage up to the limit specified is conclusive, even though the shrinkage be less.

**Contracts.—Where the Construction of a Railroad Embankment** was to be paid for by an actual measurement of the cubic contents of the embankment, and the contractor completed it without making a survey or objecting to the one made by the company's engineer, his neglect to make such survey before the surface of the ground, which was one of the necessary data for the measurement, was covered, was an admission that the company's survey was correct.

APPEAL from Superior Court, San Joaquin County.

Action by A. V. Scanlan against the San Francisco and San Joaquin Valley Railway Company. From a judgment for plaintiff and from an order denying a new trial defendant appeals. Reversed.

E. F. Preston for appellant; Gould & Bogue and Woods & Levinsky for respondent.

VAN FLEET, J.—This is an action, brought by a contractor for the construction of a railway embankment to recover the contract price for the alleged cubic contents of the embankment. The defendant had paid to the plaintiff what it claimed to be the whole amount earned, except about $20, which it brought into court. The plaintiff had judgment for the balance claimed by him, and the defendant appeals.

The contract, among other things, contained the following provisions: "On embankments a percentage for shrinkage must be added to the fill, and said percentage will be as specified and marked out by the engineer [of the company], but will in no case exceed ten per cent of height of bank." "Material will be measured in embankment, but no measurement will be made of the material added for shrinkage, nor payment made for same." Under this contract it was incumbent upon the plaintiff to prove the cubic contents of the material placed by him in the embankment, measured in the embankment, excluding the material added for shrinkage. The plaintiff produced as a witness an engineer, who testified that he had measured the embankment after its completion, and had found it to contain a certain number of cubic yards, which he stated; but he did not give the data upon which his computations (for he testified to two) were based. In his measurements and computations he made no allowance for any material added for shrinkage; nor did plaintiff in any way prove how much had been so added, though it was admitted that such additions had been made. The witness testified that his computations were made by measuring a certain number of cross-sections, finding the average area of these cross-sections, and multiplying this average area by the length of the embankment. One of the computations submitted by him was based entirely upon his own measurements, and the other, which was much less, upon the measurements of the defendant's engineer, except as to the heights, as to which the witness used his own measurements. The court, in its findings, adopted neither of these computations, but fixed the amount at an intermediate figure, for which we are unable to find

any basis in the evidence. We think that there was no evidence before the court by which the contents of the embankment could be ascertained. The finding depends entirely upon the accuracy of the computations made by plaintiff's engineer, since the measurements themselves were not before the court, and it is evident that these computations were inaccurate.

1. The court takes judicial notice of the laws of nature (Code Civ. Proc., sec. 1875, subd. 8), among which are the principles of mathematics. The science of mensuration, which must control in this case, is a branch of pure mathematics, with which the court is presumed to be acquainted. By the rules of mensuration, the contents of an irregular prismoidal body, such as a railway embankment, is ascertained by dividing it by vertical planes at every change of contour of the underlying ground into a series of prismoids, and computing the contents of each of these prismoids by adding together its two end areas and four times its middle area, dividing this sum by six, and multiplying the quotient by the length of the prismoid. The product will be the actual contents of the prismoid: See Enc. Brit., 9th ed., art. "Mensuration." This method was not employed by the witness. His method was an approximation, which assumes that the middle area of a prismoid is equal to half the sum of its end areas. This is true only in the case of a prism, or in a prismoid consisting of the frustum of a regular pyramid. This approximation, it is true, will give results correct enough for practical purposes in very uniform embankments, where there is but little difference in height. But in other cases its results are always too large, and it would be easy to suppose cases in which the excess would be greater than the difference between the estimates of the respective parties in this case.

2. The plaintiff's computations made no allowance for the additional earth put on for shrinkage. It is true that there was some testimony tending to show that at the time of the measurement the embankment, to use the words of respondent's brief, "had settled or shrunk nearly, if not quite, all it would." This testimony was entirely too indefinite to take the place of actual measurement, to which defendant was entitled under the contract. Moreover, it did not reach the point; for the amount to be added for shrinkage,

under the contract, was to be determined, within certain limits, by the defendant's engineer, and within those limits his judgment was conclusive, even if the shrinkage should turn out to be less than he had allowed for.

3. The plaintiff's engineer, working as he did after the embankment had been constructed, did not know the original condition of the ground; and, in order to supply that essential factor, he made certain assumptions, which may or may not have been justified by the facts, but which the evidence does not show to have been so justified. We do not think, however, that any such assumptions are allowable under this contract. Since the work is to be paid for by actual measurement, and the original surface of the ground is one of the necessary data for such measurement, the builder, if not satisfied with the survey made by the company's engineer, should, before commencing work, have that survey corrected, or make an accurate one for himself. A neglect to do this is equivalent to an admission of the correctness of the company's survey. The plaintiff should, therefore, have proved that survey; but he did not do this, and objected to the proof of it offered by defendant, and it was not in evidence in the case.

We would suggest that upon another trial of the case each side should put in evidence the measurements upon which any computation offered by it is founded, unless such proof is waived by the other side. If the measurements are before the court, errors in computation can be corrected.

Our conclusion upon this point renders it unnecessary to notice the other points made. The judgment and order appealed from are reversed and the cause remanded for a new trial.

We concur: Harrison, J.; Garoutte, J.

## RAMSBOTTOM v. FITZGERALD.

Sac. No. 575; December 23, 1898.

55 Pac. 984.

**Appeal.—The Enforcement of a Judgment by Execution** does not deprive defendant of the right to appeal.

APPEAL from Superior Court, San Joaquin County.

Action by R. Ramsbottom against B. M. Fitzgerald. From a judgment for plaintiff, defendant appeals. Motion to dismiss appeal denied.

J. G. Swinnerton for appellant; Elliott & Elliott and Budd & Thompson for respondent.

PER CURIAM.—The respondent has moved to dismiss the appeal herein upon the ground that since the affirmance of the judgment by this court (52 Pac. 149) an execution for the enforcement of the judgment was issued out of the superior court and has been returned by the sheriff fully satisfied. In Kenney v. Parks, 120 Cal. 22, 52 Pac. 40, and 54 Pac. 251, and in Vermont Marble Co. v. Black (S. F. No. 1207; recently decided), 123 Cal. 21, 55 Pac. 599, it was held that an enforcement of the judgment by the plaintiff does not deprive the defendant of his right of appeal. The motion to dismiss the appeal on the ground that the orders appealed from are not appealable was denied in department 2, September 12, 1898. The motion is denied.

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## PEOPLE v. LON YECK et al.

Cr. No. 462; January 6, 1899.

55 Pac. 984.

**Witness—Credibility.—An Instruction That a Witness** whose testimony is false in one part is to be distrusted in other parts is not erroneous.

**Criminal Trial.—Where an Instruction was Given at the Request** of one of the parties, he cannot, on appeal, object that it did not state a sound declaration of law.

**Criminal Trial—Appeal.—The Verdict of a Jury** in a criminal prosecution, convicting defendant, will not be disturbed on appeal where the evidence is squarely conflicting, especially where such evidence is of Chinese witnesses.

**Criminal Law—Appeal.—Rulings of the Trial Court upon the Admission** of evidence will not be reviewed where no exceptions thereto are found in the record.

APPEAL from Superior Court, City and County of San Francisco.

Lon Yeck, Lee Keong and Yee Sang were convicted of robbery, and appeal. Affirmed.

Robert Ferral for appellants; Attorney General Fitzgerald for the people.

GAROUTTE, J.—The defendants have been convicted of robbery, and appeal from the judgment and order denying their motion for a new trial. The points relied upon for reversal of the judgment are few, and of little importance.

Complaint is made that the following instruction was erroneously given: "A witness whose testimony is false in one part is to be distrusted in other parts." This enunciation of the law is framed substantially in the language of the statute, and has been directly approved in People v. Treadwell, 69 Cal. 226, 10 Pac. 502, and People v. Ah Sing, 95 Cal. 656, 30 Pac. 796. However, in giving instructions to the jury bearing upon this particular question of law, courts would do well to heed the suggestions given out in the recent case of People v. Plyler, 121 Cal. 160, 53 Pac. 553. It may be further suggested that the instruction of which complaint is now made was given at the request of the defendants, and it is not for them to now insist in this court that it does not contain a sound declaration of law.

It is also claimed that the verdict lacked support in the evidence. To this contention it may be said that the evidence is squarely conflicting. All the direct evidence comes from the mouths of Chinese witnesses, and, as usual in cases where such is the fact and where the litigation involves their interests alone, the evidence is flatly contradictory. In such a case, especially, the verdict of the jury will not be disturbed by this court.

Complaint is made as to the misconduct of the district attorney. We see nothing in the contention of sufficient merit to demand a new trial. Various rulings made by the trial court upon the admission of evidence are claimed to be erroneous; but we find no exception to them in the record, and refrain from giving them any consideration. There is no merit in this appeal. Judgment and order affirmed.

We concur: Harrison, J.; Van Dyke, J.

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## HITE v. HITE.

S. F. No. 1489; December 31, 1898.

55 Pac. 900.

**Divorce—Alimony—Evidence of Marriage.**—Plaintiff and defendant in an action for divorce had never been regularly married. There was evidence that defendant furnished plaintiff a house for her residence, and lived with her there for about twenty-five years, and supplied her with necessaries of life, and that a child was born to them; that they were known as husband and wife, and held themselves out as such; and that he treated her son by another man as his stepson. These facts were corroborated by the stepson's affidavit. Counter-affidavits by neighbors denied them, and attacked the reputation for veracity and credibility of the affiants to those facts. Held, a sufficient prima facie showing of marriage to support an order of the court below for payment of alimony and counsel fees.

**Witness—Impeachment.—Where the Court Below has Made a Finding** in conformity with a witness' testimony, it is only in exceptional instances that such witness' testimony will on appeal be held to have been impeached by the testimony of others.

APPEAL from Superior Court, Mariposa County.

Action by Lucy Hite against John R. Hite. From an order granting plaintiff alimony and counsel fees defendant appeals. Affirmed.

F. J. Castelhun, W. W. Foote and Congdon & Congdon for appellant; Rodgers & Paterson for respondent.

GAROUTTE, J.—In the pending action for divorce the trial court made an order for alimony and counsel fees.

This appeal is now prosecuted by defendant from that order. The answer of defendant denies the fact of marriage, and it is now insisted upon his part that the evidence taken at the hearing does not justify the order. It is thus apparent that the question directly confronts us, What amount of evidence is necessary to justify the trial court in awarding alimony and counsel fees in a pending action for divorce, where the existence of the marriage relation is denied? Yet, in view of the future trial of this case upon its merits, where this question will undoubtedly be the all-important question to be tried and decided, we feel that the discussion of the matter upon an appeal from the preliminary order should be circumscribed within small limits. Any other course might result in embarrassment to both parties at the trial of the cause, and therefore its discussion will serve no good purpose at the present time.

There must be some evidence tending to show a marriage relation between the parties before an order similar to the one at bar should be made. It is perfectly evident that the requirements of the law demand this, or else the doors are spread wide open for the perpetration of the greatest frauds. At the same time, that degree of evidence required to establish the marriage relation at the trial is not demanded; for, if such were the law, then the material issue arising at the trial would be litigated in advance, and this in face of the fact that the money to be obtained by the order is largely to be applied in making preparation for the trial of that identical question. In Sharon v. Sharon, 75 Cal. 43, 16 Pac. 345, it is declared that the marriage should be established "by satisfactory evidence showing at least prima facie a marriage in fact." We deem the foregoing statement fairly illustrative of the true rule for the guidance of trial courts. There should be evidence establishing prima facie the fact of marriage. The evidence of plaintiff upon the hearing should be such that the trial court may be able to say that a fair presumption of the fact of marriage arises from the showing. Does the evidence bring this case within the foregoing rule? There is no claim that a marriage between these parties was even regularly solemnized. The evidence tends to show that defendant furnished plaintiff a house in which to live, and that she resided there for the greater portion of twenty-five years; that he supplied her

during this time with the necessaries of life; that he lived with her during a great portion of this time, and a child was born to them. One Westfall testifies that plaintiff and defendant were known in that neighborhood and adjoining counties as husband and wife; that plaintiff was everywhere called "Mrs. Hite, and Lucy Hite, wife of John R. Hite," and that plaintiff and defendant "held themselves out to the world, and were always treated, as husband and wife"; that defendant always treated Thomas Gibbs, a son of plaintiff, as a son in every way, and "said Gibbs has always been considered and reputed amongst those who knew him and the plaintiff and defendant herein as the stepson of defendant John R. Hite." A stronger affidavit than the one from which we have just quoted, and upon the same general lines, was made by Thomas Gibbs, son of plaintiff by another man. If the facts stated in these two affidavits be true, then the marriage relation between these parties, for the purposes of this appeal, at least, may well be presumed to exist. Defendant offered affidavits from various residents of the community where plaintiff resided, in direct contradiction to the evidence of Westfall and Gibbs. He also attacked Gibbs' veracity by producing affidavits of various residents of that community to the effect that his general reputation in this regard was bad. But, as to this impeaching evidence, we are clear that it was essentially a matter for the trial court to weigh and estimate; and it would only be in a most exceptional case that this court, in the face of a contrary finding of the trial court, would hold the evidence of a witness impeached by testimony of other witnesses as to his general bad reputation for truth, honesty and integrity. Such a case is not presented here.

Upon all the evidence before us, taken together, we will not disturb the order of the trial court. At the same time, by so holding we do not intimate that a finding of fact that the marriage relation existed between these parties, based upon the showing disclosed by this record, would be sustained by this court if attacked upon appeal from the final judgment. Suffice it to say, upon the showing here made this court will not hold the testimony of Gibbs and Westfall, taken in connection with other facts which are substantially admitted by defendant, insufficient to support the order. Notwithstanding the hearing was had upon affi-

davits, the trial court is entitled to take a somewhat broader view of the case than is allowed to this court upon appeal; and, notwithstanding it may be conceded that the showing here discloses a preponderance of evidence against the fact of the existence of the marriage relation between these parties, still such preponderance does not necessarily take the case out of the rule by which we should be governed. Weighing the evidence favorable to the support of the order of the trial court which we have quoted in a general way from the record, we are not prepared to say that a prima facie case of marriage, sufficient to support a preliminary order for alimony and counsel fees, was not made out. There are bad spots in plaintiff's case, which no doubt will be given due consideration when squarely presented before the trial court upon the merits. We refrain from touching upon them at this preliminary hearing. There is no merit in the remaining contentions raised by appellant. For the foregoing reasons, the order is affirmed.

We concur: Harrison, J.; Van Fleet, J.

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## LEONIS v. LEFFINGWELL.

## LEONIS' ESTATE v. SAME.

L. A. No. 641; January 3, 1899.

55 Pac. 897.

**Appeal.—Motion to Dismiss Appeal, Involving an Examination of the entire record, and incidentally a consideration of the merits, will be continued until the hearing of the merits.**[1]

APPEALS from Superior Court, Los Angeles County.

Actions by Leonis, executrix, and by the estate of Leonis, against Leffingwell. From judgments for plaintiffs, defendant appeals. Plaintiffs move to dismiss the appeals. Continued.

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[1] Cited and followed in Estate of Sharp, 10 Cal. App. 3, 100 Pac. 1071, a case where the controversy was based wholly on the jurisdiction of the probate court, and its determination, as the court said, would involve the merits.

Wells & Lee for appellant; H. H. Appell, R. Dunnigan and Reynurt & Orfelia for respondents.

PER CURIAM.—The motion to dismiss the appeals in these cases involves an examination of the entire record, and incidentally a consideration of the merits of the appeals. The motions are for that reason continued until the hearing of the appeals upon their merits.

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## WHITNEY v. AMERICAN INS. CO. et al.

S. F. No. 840; January 30, 1899.

56 Pac. 50.

**Insurance.—A Notice of a Change of Title may be Given** to the person who signed the policy as insurer's agent when the policy was issued, where the insured had no knowledge that such person had ceased to be the insurer's agent.

**Insurance—Notice of Change of Title.—Under a Clause in a Policy Insuring a Mortgagee,** providing that the insurance should not be invalidated by the mortgagor's neglect, provided the mortgagee notified insurer of any change of ownership coming to his knowledge, and had permission for such change indorsed on the policy, a change of ownership to the mortgagee's knowledge does not invalidate the policy, if the change did not increase the risk, though he gave insurer no notice thereof, the provision respecting the giving of notice by him being merely directory.[1]

**Insurance.—An Insured may Make Proofs of Loss to One** who had assumed insurer's liabilities, where insurer had authorized him to receive them, and had withdrawn all its own agencies from the state.

**Reinsurance.—A Contract of a Company to Pay Losses Under Policies** issued by another company as promptly as losses under its own policies is not a contract of reinsurance, under Civil Code, section 2646 et seq., and hence the company is directly liable to the insured.

APPEAL from Superior Court, City and County of San Francisco.

Action by A. L. Whitney against the American Insurance Company and another. From a judgment for plaintiff and

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[1] **Cited** in the note in 135 Am. St. Rep. 757, on fire insurance as **security for** a mortgagee or other lienholder.

an order denying a motion for new trial defendants appeal. Affirmed.

Jas. A. Watt and John R. Aitken for appellants; Mullany, Grant & Cushing for respondent.

McFARLAND, J.—This is an action upon a fire insurance policy, in which the loss is payable to the plaintiff, as mortgagee of the land upon which the building insured was situated. Judgment was for plaintiff in the superior court, and from the judgment, and an order denying a new trial, the defendants appeal.

There is no charge of fraud or of any misconduct by the respondent which was material to the risk, and there is no apparent reason on the face of the record why, upon principles of justice and fair dealing, the loss should not have been paid. Appellants contend that they are shielded from payment by certain asserted legal defenses. These asserted defenses are substantially as follows: First, that before the fire there was a transfer of the title of the property insured, without notice thereof to appellants; second, that proofs of loss were not made to the proper party; and, third, that the Northwestern National Insurance Company was a mere reinsurer of the American Insurance Company, that there was no privity of contract between the respondent and the Northwestern, and that, therefore, respondent was not entitled to judgment against the Northwestern Company. We do not think that either of these grounds for a reversal is tenable.

1. The policy in question was issued by the appellant the American Insurance Company on September 6, 1893. (For convenience, we will call one of the appellants the "American," and the other the "Northwestern.") The premises insured were situated in Los Angeles. At the time of the issuance of the policy the legal title to the land was in James E. Gordon, who had purchased it from J. F. Sullivan, a resident of San Francisco. The amount of the policy was $1,000, and at this date the respondent held a mortgage on the premises, executed by said Sullivan, for a greater amount than $1,000; and the loss, if any should occur, was made payable to the respondent, as mortgagee. There was a mortgage clause in the policy, which provided "that this insurance, as to the interest of the mortgagee or trustee only

therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, or by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy: . . . . provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy." There was no provision that a failure by the mortgagee to give such notice should avoid the policy. In December, 1893, Gordon conveyed the property back to Sullivan, and assigned the policy to him, and this transfer and assignment were approved by the company. On May 19, 1894, the building insured was destroyed by fire. A short time prior to that event, to wit, on the 9th of May, 1894, one Beach, who was a tenant occupying the premises insured, had some negotiations with Sullivan, in San Francisco, looking to an exchange of some of his property with Sullivan for the insured property at Los Angeles; and, as a result of those negotiations, Beach requested Sullivan to make a deed of the insured premises to one Taylor, who lived at Los Angeles. Beach expected that Taylor would accept a deed of these premises in satisfaction of certain claims which Taylor had against Beach. Sullivan executed the deed to Taylor, and Beach sent it to the county recorder at Los Angeles, who recorded it; but Taylor repudiated the transaction, and refused to accept the deed. A day or two afterward, Sullivan wrote to the respondent that he had made the deed to Taylor. Thereupon the respondent looked over the records in Los Angeles, and could not find that any such deed had been recorded. Respondent informed J. K. Mulkey, who was the agent of the American company at the date of the issuance of the policy, and who signed the policy as such agent, and who respondent had every reason to believe was still the agent of such company, of the letter which he had received from Sullivan about the sale of the premises to Taylor; and Mulkey told the respondent that he thought no change would be advisable, as there was no evidence of the actual transfer. Mulkey had also received a notice from Beach that the property had been deeded to Taylor. Under these circumstances, we see no reason whatever for holding that the policy had been forfeited on ac-

count of respondent's conduct with respect to notice of the transfer. Owing to the refusal of Taylor to accept the deed, it is doubtful if any transfer of the title ever took place, although it is not necessary to absolutely determine that point. Respondent, at all events, gave all the notice which he could be fairly expected to have given. The provision in the policy that respondent should inform the insurance company of such transfer of the property as should come to his knowledge is only directory, and his failure to do so is not declared to be such a violation of the policy as would avoid it; and his failure to give such notice would have been material only where it would have caused prejudice or increased risk to the insurance company, and there is no pretense of such a thing here. It may be observed, as appellant seems to attach some importance to the fact, that, although Beach held a general power of attorney from Taylor, the transaction between Beach and Sullivan was one which Beach entered into on his own behalf, and not in his capacity as attorney in fact for Taylor.

2. On the next day after the fire, respondent called on said Mulkey, as agent of the American company, and informed him of the fire. Thereupon, for the first time, Mulkey stated that he was no longer agent of said company, that said company's policies on this coast had been assumed by the Northwestern Company, and that Betts & Silent, of Los Angeles, were the agents. Soon afterward Mr. T. A. Nerney sought out the respondent, and informed him that he was the agent and adjuster of the Northwestern, and took him to the office of Betts & Silent, and there prepared and caused proof of loss to be made in due form, which proof of loss he sent to George W. Turner, at San Francisco, who was the general agent for the Northwestern; and he (Nerney) assured respondent that the money due for the loss by fire would be paid. It is a fact that Nerney was the agent and adjuster of the Northwestern at Los Angeles, and that Turner was the general agent of the Northwestern. The American and Northwestern were both foreign corporations. These further facts appear: In March, 1894, a written contract was entered into between the American and the Northwestern, by which, in consideration of certain money and property given by the former to the latter, and in consideration of the payment by the American to the North-

western of certain pro rata unearned premiums under each and every policy of the American in force in certain states and territories, including California, the Northwestern assumed all the liabilities of the American upon all its policies, among which it is admitted the policy in question in this action was included. By that contract the Northwestern covenanted that it "will make as prompt adjustments and payments of loss, if any, under any and all of its policies of the said American Insurance Company, as it would under its own policies, if issued direct to said assurer." Thereafter all the agencies of the American company in California were revoked, and the Northwestern took the entire control and management of all matters arising out of said policies, and the adjustment of losses in cases of fire, and the American practically disappeared from the business. Several years before that, the American company had filed in the office of the insurance commissioner of this state a designation of one Ed. E. Potter as its agent; but, a few days after the fire, Sullivan went to see Potter, who informed him that he was no longer agent of the American, except perhaps for the purpose of settling with the Northwestern company. The proofs of loss above referred to were made within five days after the fire, and were directed formally to the American company, but were sent, as above stated, to Turner. Turner testified that, after the contract between the Northwestern and the American above noticed, "I had charge of the business covered by that contract, including the risk of policy sued for here, and now before this court." He also testified that Nerney was the agent of the Northwestern, and had charge at Los Angeles, and that, "as to this policy sued on, I began to handle it about a week or ten days after the fire. Just as soon as I received the proof of loss from Mr. Nerney, I went to work on the subject, and called on Mr. Sullivan." He further testified that "Mr. Potter had called in all the agencies of the American Insurance Company before the fire occurred for the loss for which this action is prosecuted," and that the Northwestern, "through its agents and under my general agency, had been attending to the affairs under the policies of insurance issued by the American Insurance Company's agents under this agreement since about April 1, 1894, and it was under that agreement, and in the duty and in the pursuance of the duties which

were assumed under that agreement, that I went to see Dr. Sullivan in regard to this policy; and Mr. Nerney attended to the taking of the proofs of loss on behalf of the American Insurance Company in Los Angeles from A. L. Whitney, the plaintiff herein. I, as agent of the Northwestern National Insurance Company, had authority to receive the proofs of loss under this policy of the American Insurance Company. I am aware that the fire occurred on May 19 or 20, 1894, under the policy sued on in this action." But, after Turner "began to handle" the matter, he learned from Sullivan that the latter had made a deed to Taylor, Sullivan supposing at that time that the title had passed from him to Taylor through the deed which he had executed to the latter; and thereafter Turner returned the proofs of loss, and the defenses set up in this case seem to have been determined upon. We have stated these facts somewhat fully here, because they are applicable to the third point made by the appellants. Upon these facts, we think that the proofs of loss were properly made.

3. Appellants have argued the third point as though the contract above referred to between the two insurance companies, and their subsequent action carrying it out, amounted to nothing more than the dry, naked contract of reinsurance, under section 2646 et seq. of the Civil Code. But the facts hereinbefore stated show a contract much broader than a mere technical reinsurance. The Northwestern, under the situation here shown, was directly liable to the plaintiff, upon the principle declared and illustrated in Morgan v. Mining Co., 37 Cal. 534; Flint v. Cadenasso, 64 Cal. 83, 28 Pac. 62; Lockwood v. Canfield, 20 Cal. 126; Arnold v. Lyman, 17 Mass. 400, 9 Am. Dec. 154. As was said in Morgan v. Mining Co., supra, "the companies agreed, and the plaintiff manifests his assent by bringing the action." In Arnold v. Lyman, supra, the court said: "The promise being not to Hutchins expressly, but general in its form, the assent of the creditors made them parties to the promise; and this assent is sufficiently proved, as respects the plaintiffs, by their bringing an action upon the contract." "The law creates the privity necessary" for the maintenance of this action.

Appellants make some points as to the insufficiency of the evidence to justify some of the findings; but the findings attacked are either unimportant, under the views above ex-

pressed, or the objections thereto have been substantially noticed above. The finding which is most objected to is the one to the effect that Sullivan remained the owner of the property; but, as hereinbefore stated, that matter is unimportant. The finding "that plaintiff has duly performed all the conditions and covenants on his part to be performed under said policy of insurance" is fully sustained by the evidence as hereinbefore stated. The other objections to the findings are unimportant and immaterial. The judgment and order appealed from are affirmed.

We concur: Temple, J.; Henshaw, J.

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## LINGARD et al. v. BETA THETA PI HALL ASSOCIATION et al.

S. F. No. 832; February 2, 1899.

56 Pac. 58.

**Mechanics' Liens.—In an Action to Foreclose a Mechanic's Lien,** the complaint alleged the date of the completion of the building, and that the lien was filed on April 6, 1894, within thirty days thereafter. The answer denied "that within thirty days from and after the completion of said building, to wit, upon the sixth day of April, 1894, or at any other time, or at all," plaintiffs filed their claim of lien, containing a statement of their demand. Held, that the answer was but a denial of the time of filing the notice of lien, and of its sufficiency, and admitted the allegation of the time when the building was completed.

APPEAL from Superior Court, Alameda County.

Action by one Lingard and others against the Beta Theta Pi Hall Association and others to foreclose a mechanic's lien. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Garber, Boalt & Bishop and Wm. H. Jordan for appellants; Thomas F. Graber for respondents.

PER CURIAM.—Action for the foreclosure of a mechanic's lien. The only point urged in support of the appeal is

that the notice of a claim of lien was not filed in the recorder's office within thirty days after the completion of the building. It is alleged in the complaint that the building was completed on the 13th of March, 1894, and this allegation is not denied. It is also alleged that within thirty days of the completion of said building, to wit, on the sixth day of April, 1894, the plaintiffs filed for record their claim of lien, setting forth its contents. In their answer the defendants "deny that within thirty days from and after the completion of said building, to wit, upon the sixth day of April, 1894, or at any other time, or at all, plaintiffs did file for record their or any claim of lien, containing a statement of their demand," etc. This was but a denial of the time of filing the notice of lien, and of the sufficiency of its contents to create a lien, and cannot be construed as a denial of the allegation in the complaint of the time when the building was completed. This allegation must therefore be accepted as an admission upon the record of the date when the building was completed, and, as the court would not have been authorized to make a finding contrary to this admission, it is unnecessary to determine whether the evidence before it was sufficient to sustain its finding. The court finds that the notice of lien was filed on the sixth day of April, 1894, and the correctness of this finding is not disputed. The judgment and order are affirmed.

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## PEOPLE v. DENOMME.

Cr. No. 425; January 30, 1899.

56 Pac. 98.

**Manslaughter.—Deceased, Who was Drunk, Approached Accused,** a stranger, in a saloon, making an insulting remark, which the latter took to be addressed to himself, and, after pushing deceased away, on his second approach struck him with his fist—once in the face, and several times over the heart. Deceased was unarmed, but accused testified he had his right hand closed, and accused struck him to protect himself, though there was no showing that deceased's manner was menacing, nor that accused's violence was justifiable. Deceased died in two hours of heart rupture, which the evidence showed the blows were sufficient to cause. Held, that the killing was man-

slaughter, under Penal Code, section 192, making killing as the result of an unlawful act, committed without due caution and circumspection, such offense.[1]

**Manslaughter.—The Use of the Instructions in the Argument** to the jury is within the discretion of the court.

APPEAL from Superior Court, Fresno County.

Jeremiah Denomme was convicted of manslaughter, and he appeals. Affirmed.

W. D. Crichton for appellant; Attorney General Fitzgerald for the people.

CHIPMAN, C.—Defendant, Jeremiah Denomme, was charged by information with the crime of murder, alleged to have been committed upon one C. B. Molbeck, at the county of Fresno. Upon his plea of not guilty a trial was had and a verdict of guilty of manslaughter returned, upon which he was adjudged to punishment for five years in the state prison. This appeal is from the judgment, and from an order denying defendant's motion for a new trial.

1. Appellant claims that the evidence does not justify the verdict. The homicide occurred in a saloon. Deceased was quite drunk, although able to walk. Shortly before the assault he had been drinking at the bar with two other men, when some trouble arose, and the bartender knocked one of the party down. Defendant was not one of those three, but was in the saloon at the time. Just after this occurred, deceased started to go toward the rear of the saloon, and on his way passed near defendant, who was standing near a safe, talking with another person. A witness, who was sitting at a card table at the time, facing the bar and the parties, saw deceased as he approached defendant, and testified to what deceased said, as follows: " 'It is a—' I couldn't tell whether he said, 'You are a son-of-a-bitch,' or whether he said, 'It is a son-of-a-bitch of a shame for to hit a man like that.' Something like that. I know the 'shame' was brought in. I don't know whether he called this man [defendant] a son-of-a-bitch,

[1] Cited and followed in People v. Mullen, 7 Cal. App. 549, 94 Pac. 868, in which case the facts were held to justify a verdict of involuntary manslaughter, when the killing was produced by the defendant's fist while the victim was interfering with the brutal kicking of another man, whom the defendant had knocked down.

or whether he said it to himself. That was the first time he went over there. This defendant reached up his hand, and he pushed him to one side. He says: 'Go on. I don't want to have no trouble.' Molbeck [deceased] got a couple of steps back, and he walked up toward the man again; and, with this, defendant grabbed him by the neck and hit him. Molbeck was good and drunk. Then defendant come up and hit him like this, hard [illustrating over the heart], and Molbeck started back; put his hands up this way over his face. Then the defendant kept hitting him, hitting him like that [illustrating over the heart], I should say about four or five times." Other persons witnessed the assault at different stages. Deceased had no weapon in either hand, and did not strike defendant at any time. One witness asked defendant why he struck deceased, who replied that he stepped on his toes and called him a son-of-a-bitch. Defendant testified that deceased came up to him, and asked the way to the water-closet, and, being told, deceased replied, "You bastard son-of-a-bitch! I know where the water-closet is as well as you do," whereupon defendant pushed him away. He testified: "He came back—he had this hand shut and this open—toward me, and when I see he was near to me I strike him. I strike him in the face. . . . . I struck him twice on the body. . . . . I was afraid he might hurt me bad or get something." At another place he testified: "I didn't see anything in his hands. He had his left hand open." He also testified that he struck the deceased to protect himself. He was asked if he noticed the condition of deceased, and answered: "Well, I thought the man might have a little liquor in him, but not right drunk, seemed to me. I didn't pay much attention to the man, never having seen him before." Defendant did not testify that the manner of deceased was menacing or threatening, nor did it appear from any of the evidence that defendant was in the slightest degree justified by any conduct of deceased in making so violent an assault under the reasonable belief that his own life or limb was in danger. The reason for the assault given by defendant furnished no justification. The deceased was placed in a chair shortly after the assault, and died in about two hours at the saloon. The autopsy disclosed rupture of the heart, from which death ensued, and the evidence was that blows such as deceased received at the hands of defendant were sufficient

to have caused death from rupture of the heart. There was no evidence of defendant having any ill-will toward the deceased, or even any previous acquaintance with him, and defendant no doubt spoke the truth when he testified that he had no intention of killing deceased when he struck him, and the circumstances rebut the imputation of malice toward the defendant. But the killing was the result of an unlawful act committed without due caution and circumspection, and, although involuntary, it was manslaughter: Pen. Code, sec. 192.

2. Appellant assigns error in not allowing defendant's attorney, Mr. Crichton, to argue the law to the jury. The facts are brought to our attention by affidavits and counter-affidavits. It appears that the court, on its own motion, interrupted counsel, when about to read an instruction which counsel supposed had been previously settled by the court. It does not seem necessary to state fully the facts set forth in these affidavits. There is nothing in them to distinguish the case from other cases which have arisen and have been decided by this court. In some of the superior courts of the state the practice is to settle the instructions, as far as possible, before argument to the jury, and to allow counsel unrestricted use of these instructions in arguing the case. This practice is by no means universal, however, and is not at all obligatory. It is discretionary with the court whether counsel shall be permitted to use the instructions before the jury: Boreham v. Byrne, 83 Cal. 23, 23 Pac. 212. In People v. Carty, 77 Cal. 213, 19 Pac. 490, it was held that the court properly refused to permit counsel to argue the law to the jury in his opening address. The orderly procedure in criminal trials is laid down in title 7, Penal Code. It is the duty of the district attorney and the counsel for the accused to place the evidence before the jury, and at its conclusion they may or may not, as they wish, "argue the case to the court and jury." "The judge may then charge the jury, and must do so on any points pertinent to the issue if requested by either party; and he may state the testimony and declare the law": Pen. Code, sec. 1093. Except on a trial for libel, "questions of law are to be decided by the court, questions of fact by the jury; and although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, neverthe-

less, to receive as law what is laid down by the court": Pen. Code, sec. 1126. "In charging the jury the court must state to them all matters of law necessary for their information": Pen. Code, sec. 1127. There can be no doubt that the theory of the procedure is that the law which is to govern the jury must come from the court alone. And while it has been held here to be objectionable, either in civil or criminal actions, to read law to the jury (People v. Anderson, 44 Cal. 65), it has been also held not to be reversible error to permit it to be done, as the matter is wholly within the discretion of the court (People v. Treadwell, 69 Cal. 226, 10 Pac. 502). In Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655, it was held not error to refuse to allow defendant's counsel to read law books, or make an argument on the law of the case, or to state what he claimed to be the law, to the jury. In People v. Wheeler, 60 Cal. 581, 44 Am. Rep. 70, it was held error to allow the district attorney to read from "Browne's Medical Jurisprudence of Insanity," against the objection of defendant. It will thus be seen that the contention of defendant cannot be sustained. In the argument to the jury there are certain universally accepted principles of law which naturally and almost necessarily find their way into an argument upon the facts, and the fairness and intelligent discrimination of the court may be relied upon to hold counsel under just and proper restraint in the illustration of facts by calling attention to pertinent principles of law. But, as we have seen, the decisions leave with the court the discretion to limit counsel to a discussion of the facts; and we think this discretion may be exercised by the court upon its own motion, as was done in the present case. The rights of defendant are fully conserved by the provisions of the statute: Pen. Code, secs. 1093, 1127. The judgment and order should be affirmed.

We concur: Britt, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## PEOPLE v. CAPPOLA.*

Cr. No. 497; February 13, 1899.

56 Pac. 248.

**Robbery—Identifying Defendant.—There is Evidence to** identify defendant as the person who committed the robbery, prosecuting witnesses testifying that he was one of the persons who robbed him, though defendant and his witnesses testified that he cut off his mustache a month before the robbery, and had not worn one since, and prosecuting witness, who testified that he had seen defendant after, as well as a year before, the robbery, said that when he "previously met" him he wore a mustache; the jury being at liberty to hold that the time thus referred to was when he met defendant a year before the robbery.

APPEAL from Superior Court, City and County of San Francisco.

One Cappola was convicted of robbery, and appeals. Affirmed.

P. J. Mogan for appellant; Attorney General Ford for the people.

PER CURIAM.—The defendant was convicted of the crime of robbery, and has appealed from the judgment thereon upon the ground that the evidence was insufficient to identify him as the person who committed the robbery. At the trial the prosecuting witness testified that the defendant was one of the persons by whom he was robbed, and also testified that he had seen him on two occasions subsequent to the robbery; and, although the defendant and witnesses on his behalf testified that he was not present at the robbery, but was at that time in another place, the verdict of the jury shows that they gave credit to the prosecuting witness rather than to the others. The prosecuting witness also testified that he had met the defendant several times, a year or more before the robbery, and on cross-examination he testified that when he "previously met" him he wore a mustache. The defendant, and several witnesses on his behalf, testified that he cut off his mustache about a month prior to the date of

*Rehearing denied March 15, 1899.

the robbery, and had not worn one since, and it is urged that for this reason the testimony of the prosecuting witness as to his identity must be disregarded. The jury, however, were at liberty to hold that the time referred to by the witness in testifying that the defendant wore a mustache when he "previously met" him was the time when he met him the year before the robbery. The judgment is affirmed.

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## NASH v. KRELING.

S. F. No. 937; February 13, 1899.

50 Pac. 260.

**Contract of Employment.—One About to Enter the Employ of** another demanded $100 per week for the term of two years. The employer offered him $75 a week for the first year, and $100 for the second. He declined, but agreed to contract for $90 a week for the first year, and, if business should not then warrant the $10 raise, he would wait until it did. This was accepted. Held, that this was a contract for one year only.[1]

**Contract of Employment.—In an Action for Salary as Stage Manager** of a theater, the court charged that if plaintiff agreed to devote his whole time to the theater, and to the duties of his employment, and to advise with defendant during business hours and when requested regarding the stage or business affairs, but failed and neglected any portion of his duties, he could not recover. Held, that the charge was not prejudicially erroneous, as allowing the original written contract to be varied by parol, as or implying, without evidence to support it, that his employment included other duties than that of stage manager; the evidence showing that his duties included the alleged additional promises, and the court having also charged that defendant employed plaintiff as stage manager, and could not require of him any formal contract differing from that shown by the original correspondence, nor to perform any duties not appertaining

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[1] Cited and approved in Lynn v. Richardson, 151 Iowa, 290, 130 N. W. 1099, where a correspondence in respect of a dental business was held to constitute a contract for the sale of the business.

Cited in the note in 110 Am. St. Rep. 755, on contracts by telegraph and the admissibility of telegrams as evidence.

Cited in the note in Ann. Cas. 1912B, 130, on reference by contracting parties to future contract in writing as negativing existence of present contract.

to his employment, and that the employer was entitled to the employee's services during reasonable hours of his employment, and that the jury must determine plaintiff's duties as stage manager, and whether he had neglected them.

**Trial.—A Verdict on Conflicting Evidence is conclusive.**

APPEAL from Superior Court, City and County of San Francisco.

Action by John E. Nash against Ernestine Kreling. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Naphtaly, Friedenrich & Ackerman for appellant; H. H. Lowenthal for respondent.

BRITT, C.—The trial of this case resulted in a verdict and judgment for defendant. Plaintiff avers that defendant employed him for a term of two years, beginning August 6, 1894, to be stage manager of a theater conducted by her, known as the "Tivoli Opera House," in the city of San Francisco, at a salary of $90 per week for the first year, and $100 per week for the second. On June 2, 1895, she discharged him from said employment; and he sues in this action for alleged damages sustained by reason of such discharge during twelve weeks, beginning July 1, 1895, amounting, at the alleged rate of salary for that period, to $1,150. The defense is that plaintiff was employed from week to week only, and also that he so neglected the duties of his employment as to justify his discharge, even if his contract was for the fixed period alleged by him.

To establish the terms of the contract, plaintiff produced in evidence a series of letters and telegrams which passed between himself, at various points in the eastern states, and defendant, in San Francisco. From these it appeared that their negotiation related at first to an employment of plaintiff as stage manager of said theater for two years, plaintiff's first demand being $100 a week for the entire term. At length defendant offered him $75 a week for the first year, and $100 a week for the second. Plaintiff replied declining the proposal, and added: "I will sign a contract for ninety dollars a week for the first year, and, if at the end of that time business should not warrant the ten-dollar raise, I would wait until it did"; to which defendant rejoined: "Your

terms, ninety dollars a week, accepted, . . . . which you can consider a contract until you get here, and then I will draw up proper one to suit." No other, however, was drawn up at any time. Plaintiff came to San Francisco, and entered upon said employment, and received, it seems, compensation at $90 per week from August 6, 1894, until he was discharged, as stated. The court instructed the jury that said letters and telegrams constituted a contract upon the part of defendant to pay plaintiff for one year, but no longer.

On the issue whether plaintiff habitually neglected the requirements of his position of stage manager, and so warranted the defendant in discharging him (Civ. Code, sec. 2000), it became necessary to prove what his duties were, and on this point the evidence was discordant. The testimony for plaintiff tended to show that the duties of his employment "were entirely behind the curtain." There was other evidence, however, tending to show that, besides supervising the immediate production of plays and operas, it was the duty of the stage manager at said theater to keep informed of new attractions of that character, and of disengaged actors and actresses who might be available for the house, and negotiate for both new pieces and new people, subject to the control of the general management, and otherwise to assist the management "both on and off the stage." There was also evidence that, when plaintiff arrived in San Francisco, he told defendant that he would "look out generally for the Tivoli, get new people and new plays, and devote all his time to the Tivoli," and consult with her about its affairs. Among the instructions given by the court to the jury was the following: "I charge you that if you find, from the evidence, the plaintiff agreed with Mrs. Kreling, upon his arrival in San Francisco, to devote his whole time and attention to the Tivoli, and to the duties of his employment, and he then promised and agreed with the defendant to advise and consult with her during business hours with regard to the stage affairs or business affairs of the Tivoli Opera House, and agreed to advise with her when requested to do so, in consideration of the receipt of ninety dollars per week, and if you are satisfied from the evidence that he habitually failed and neglected any part or portion of said duties, then plaintiff cannot recover in this action." The court also charged the jury, in substance, that defendant employed

plaintiff to be stage manager of her theater; that she was not entitled to require of him the execution of any formal contract differing from that shown by the letters and telegrams, nor to perform any duties not appertaining to his employment; that an employer is entitled to the time and services of the employee during the reasonable hours of his employment; and, further, with considerable iteration, that they (the jury) must determine from the evidence in the case what were plaintiff's duties in the capacity of stage manager, and whether he habitually neglected any of them.

1. Plaintiff complains of the instruction that the contract of employment evidenced by said letters and telegrams was for a term of one year only. As the jury found that plaintiff was not entitled to recover at all, not even for loss of the contract during the closing weeks of the first year, it is not apparent that he could have been injured by this instruction. But the view of the court was correct. Plaintiff's final proposal was for one year's service, at $90 per week, stating also a willingness to continue the employment at the same compensation until "business should warrant the ten dollars raise." This was a modification of his previous demand of $100 a week for a second year. But we do not find that plaintiff has anywhere alleged or claimed that defendant agreed to such modification. She accepted his terms of $90 a week for one year, but there was no agreement as to wages for another year, and hence no employment beyond the first year; for there is nothing in the correspondence between the parties to indicate that the defendant had in mind any period of service for which the rate of compensation was not fixed in advance.

2. The instruction which has been quoted above at length, relating to what plaintiff agreed to do, is strenuously attacked. Plaintiff contends that the instruction ignored the existence of a contract before his arrival in San Francisco; or, at least, that it allowed the terms of such prior contract, which was evidenced by writing, to be added to by parol, and that it implied, without evidence to support the assumption, that duties other than those of stage manager were included in his employment. The hypothetical statement in the instruction of duties which might be found to pertain to plaintiff's position did not, as modified by other parts of the charge, transcend the evidence which tended to attribute

those duties to such position, irrespective of any agreement he might have made after reaching San Francisco; that is to say, there was evidence that, to perform properly the duties of stage manager at the Tivoli Theater, plaintiff should have done those things, whether he specifically so promised when he came to San Francisco or not. The contract evidenced by the writings was, as the court held, a continuing one, good after plaintiff reached San Francisco, as well as before; and the continuance of its provisions is probably what the court meant by reference in the instruction to plaintiff's agreements upon his arrival, treating those agreements as particulars of plaintiff's existing obligations; and, in view of other instructions given, we do not think the jury could have understood that the contract created by the letters and telegrams was to be at all disregarded, or that plaintiff was under obligation to serve defendant, except within the terms of that contract. They were told, in effect, that the written communications between the parties amounted to a contract, and that plaintiff was not required to sign any contract at all different therefrom, nor to perform any duties not included therein; also, that it was for them to determine from the evidence before them what constituted his duties as stage manager, and whether he neglected such duties. The reference in the instruction to the obligation of plaintiff to devote his whole time and attention to the Tivoli was qualified by the words following, "and to the duties of his employment," and by the charge elsewhere that "an employer is entitled to the time and services of an employee within all the reasonable hours of his employment." From the whole charge the jury can hardly have inferred, as supposed by plaintiff, that he was required to "be continually at the beck and call of the defendant."

In reviewing the charge to a jury, it must be held in mind that its different parts are to be considered in their mutual bearings, and as explanatory of each other, and that the jury is presumed to be capable of understanding the proper connection of the several parts, and their application to the facts. If, thus construed, the charge fairly and correctly states the law necessary for the guidance of the jury, the judgment founded on their verdict should not be reversed, because some portion of the charge does not in its detached form contain all necessary qualifications which are made suf-

ficiently prominent elsewhere. This is elementary doctrine: People v. Bagnell, 31 Cal. 400; Ellis v. Tone, 58 Cal. 290; Cousins v. Partridge, 79 Cal. 224, 21 Pac. 745; Davis v. Button, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545. While, therefore, the instruction under criticism was carelessly drawn, and went to the verge of error, we feel satisfied that, upon the whole charge, the jury were not misled to plaintiff's prejudice.

3. The argument that the evidence of plaintiff's neglect of his duties was not sufficient to sustain the verdict does not much impress us. The evidence on this issue was at least conflicting, and the verdict is conclusive. The judgment and order denying a new trial should be affirmed.

We concur: Pringle, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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## NASH v. KRELING.

S. F. No. 1013; February 13, 1899.

56 Pac. 262.

**Contract of Employment.—Defendant, in California, had Been in Communication** with plaintiff, in Connecticut, looking to his engagement as stage manager. Plaintiff wrote, declining previous offers, but stated he would sign a contract for a certain sum for the first year, and, if at the end of that time business should not warrant a certain raise, he would not ask it. Defendant replied by telegram, "Your terms, $90 a week, accepted," and, in a letter, wrote that she had sent a telegram, which plaintiff could consider a contract until he arrived, when a proper one would be drawn up. Plaintiff became stage manager, and defendant suggested that a contract should be drawn up, but he stated it was unnecessary. Held, to create a contract between the parties.

APPEAL from Superior Court, San Luis Obispo County.

Action by John E. Nash against Ernestine Kreling. There was a judgment for plaintiff and defendant appeals. Affirmed.

H. H. Lowenthal for appellant; Naphtaly, Friedenrich & Ackerman for respondent.

BRITT, C.—This action is founded upon the same alleged breach of a contract of employment which is considered in the opinion rendered in the case of the same title (S. F. No. 937), 56 Pac. 260. In the present case, which was begun earlier than the other, plaintiff proceeded for the salary he would have earned under his contract, at $90 per week, during the four weeks next following his discharge, and ending June 30, 1895; and, contrary to the result in the other case, he obtained a verdict and judgment for the amount demanded. The defense was substantially the same in both actions.

On the trial of this case it appeared in evidence that sundry communications were sent between the parties—plaintiff at the east, defendant in San Francisco—looking to an engagement of plaintiff as stage manager of defendant's theater. Finally, in a letter dated at New Haven, Connecticut, May 11, 1894, plaintiff declined defendant's terms previously offered, and continued: "I will sign a contract for ninety dollars a week for the first year, and if at the end of that time business should not warrant the ten dollars raise, I would wait until it did." On May 18th defendant replied by wire: "Your terms, ninety dollars a week accepted. Letter follows." In the letter thus mentioned, she said: "Yours of the 11th received, and, in answer, sent telegram, which you can consider a contract until you get here, when I will draw up a proper one to suit." In reliance on these messages, plaintiff came to San Francisco, and became stage manager of defendant's theater, and received wages at the rate aforesaid, from August 6, 1894, to June 2, 1895. Defendant testified that she suggested to him about the time his salary began that a contract should be drawn and signed, but he said it was unnecessary; and so the matter rested. The court below ruled that the several letters and telegrams constituted a contract for the employment of plaintiff as stage manager at defendant's theater, for the period of one year, at a salary of $90 per week. Defendant urges that they were ineffectual to create any contract at all.

We differ with defendant. After endeavors to reach an agreement, which had continued by letter and telegram, for a month prior to May 18th, it is hardly credible that the par-

ties, or either of them, intended that plaintiff should come from the east to San Francisco to find that no agreement at all existed, or that what defendant declared to be a contract —by its terms wholly performable after plaintiff's arrival in San Francisco—should, upon his arrival, become a nullity. Rather, we hold, the circumstances considered, the remark in defendant's letter as to "drawing up one to suit" had reference merely to a more formal and detailed statement of the mutual obligations of the parties, and not to the rejection or suppression of what was already agreed in writing. Defendant relies on Spinney v. Downing, 108 Cal. 666, 41 Pac. 797. It may be true, as held in that case, that, when parties to a contract intend that it shall be reduced to writing and signed by them, it is not obligatory upon either until evidenced in the manner contemplated; but that is not saying that a contract already reduced to writing, and signed, is of no binding force merely because it contemplates a subsequent and more formal instrument, as the repository of the terms of the agreement. In a recent case, involving a contract, which, as here, rested in letters and telegrams, it was held (we quote from the headnote) that a "stipulation to reduce a valid written contract to some other form does not affect its validity, and the stipulation may not be used by either of the parties for the purpose of . . . . evading the performance of any of the provisions of the contract": Sanders v. Fruit Co., 144 N. Y. 209, 43 Am. St. Rep. 757, 29 L. R. A. 431, 39 N. E. 75. The doctrine is reasonable, and we have no doubt of its just application to the case before us: See, also, cases collected in 7 Am. & Eng. Ency. of Law, 2d ed., pp. 140, 141.

Defendant asserts that the evidence did not justify the verdict. The main question of fact was whether plaintiff neglected the duties of his employment. Upon this issue, as at the trial of the case determined in S. F. No. 937, (ante, p. 233, 56 Pac. 260), the evidence was conflicting; and, as the verdict there was conclusive of the question for defendant, so here it is conclusive against her. The order denying a new trial should be affirmed.

We concur: Pringle, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order denying a new trial is affirmed.

## PEOPLE v. OUBRIDGE.*

Cr. No. 499; February 28, 1899.

56 Pac. 442.

**Forgery.—Where Experts Testified That a Check Defendant was charged with forging was signed by the name charged in the indictment, and the jury so found, a conviction will not be reversed on appeal on the ground of variance, though the name appearing thereon might be deciphered slightly differently.**

APPEAL from Superior Court, Alameda County.

Henry Oubridge was convicted of forgery, and he appeals. Affirmed.

W. H. O'Brien for appellant; Attorney General Ford for the people.

PER CURIAM.—Defendant has been convicted of the crime of forgery, and now prosecutes an appeal to this court. It is contended that a fatal variance exists between the allegations of the information and the proof, in this: that it is alleged the forged signature to the check is "Ned Forester," while the check, upon its face, shows the signature to be "Ned Forestns." There is no merit in the contention. It is not at all apparent from an inspection of the check that the signature is "Ned Forestns." It might readily answer to the call of other signatures equally with that of "Forestns." There was expert testimony tending to show that the signature was "Forester," and, in addition to that testimony, the jury had the check before them for personal inspection. Under this evidence of the expert, and from personal inspection, the jury, by their verdict, declared the signature was "Forester," and this court will not disturb that finding of fact. No other point is made by defendant upon his appeal, and for the foregoing reasons the judgment and orders appealed from are affirmed.

*Rehearing denied.

## DOWNING v. MULCAHY et al.

S. F. No. 786; March 4, 1899.

56 Pac. 466.

**Money Received.—In an Action for Money Received** it is not essential to jurisdiction of the parties or of the subject of the action to allege where the cause of action accrued.

**Money Received.—It is not Essential to a Complaint** in an action for money received that it recite every detail out of which the cause of action arises, since, under Code of Civil Procedure, section 454, defendant can demand a bill of particulars, if the complaint is too general.

**Appeal—Weight of Evidence.—The Appellate Court** cannot decide on the weight of the evidence.

APPEAL from Superior Court, City and County of San Francisco.

Action by F. O. Downing, doing business as Downing & Co., against R. E. Mulcahy and E. De Kay Townsend, partners as Mulcahy, Townsend & Co. From a judgment for plaintiff, and an order denying defendants' motion for a new trial, they appeal. Affirmed.

Henry H. Davis for appellants; Mastick & Mastick for respondent.

CHIPMAN, C.—Action for money had and received by defendants, as brokers, for the use of plaintiffs. The cause was tried by the court without a jury, and plaintiff had judgment, from which, and from the order denying defendants' motion for a new trial, this appeal is taken.

1. Defendants demurred to the complaint on the grounds: (1) Insufficiency of facts; (2) want of jurisdiction of the subject matter of the action and of the parties; (3) for ambiguity and uncertainty. The objections on the last two grounds alone are insisted upon. Want of jurisdiction is claimed because "the complaint does not allege the place where the alleged cause of action accrued." The complaint is in the usual form for money had and received by defendants as brokers for plaintiffs between certain stated dates, and we think the pleading sufficient. It was not essential to

jurisdiction of the parties or the subject of the action to allege where the cause of action accrued. The alleged ambiguity is that the complaint is uncertain because it does not show at what place defendants received the money, nor for what it was paid, nor the kind of brokerage defendants were engaged in, nor the times when the payment was made, nor whether paid at one time or several times, nor where demand was made, nor where the debt became due, nor where the parties, plaintiff and defendants, were doing business. These facts were not essential to a good complaint for money had and received. Defendants could have had a bill of particulars and they demanded it: Code Civ. Proc., sec. 454.

2. It is claimed by appellants that "plaintiff failed to establish his case by a preponderance of evidence." Plaintiff testified to certain statements of account between the parties rendered by defendants to plaintiff from time to time and up to November 1, 1894, which showed a balance due plaintiff at that time of $3,883.40. He also testified to certain credits to which defendants were entitled, leaving an actual balance due plaintiff of $431.45, for which amount the court gave judgment. There is much evidence in the record explanatory of the nature of the brokerage business, out of which the cause of action arose, and the state of the account between the parties. At most this evidence may be said to show its preponderance to be against plaintiff's claim. But we cannot decide upon the weight or preponderance of the evidence. There was sufficient evidence to sustain the findings, and, as the findings sustain the judgment, we think the judgment and order should be affirmed and so advise.

We concur: Britt, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## MOTT et al. v. CLARKE.

S. F. No. 783; March 7, 1899.

56 Pac. 545.

**Contempt—Right of Appeal.—Under Code of Civil Procedure, section 1222, a judgment in contempt proceedings is not appealable.**

APPEAL from Superior Court, City and County of San Francisco.

Action by C. W. Mott and others against Alfred Clarke. From an order adjudging defendant guilty of contempt, he appeals. Appeal dismissed.

Alfred Clarke in pro. per.; Warren Olney for respondents.

PRINGLE, C.—This is an attempted appeal from an order of the superior court of the city and county of San Francisco, made December 4, 1895, adjudging appellant "guilty of contempt, and that he be confined in the county jail twenty-four hours, and pay to Eli T. Sheppard two hundred and seventy-five dollars on or before December 6, 1895." The order is not appealable: Ex parte Clancy, 90 Cal. 553, 27 Pac. 411; Cosby v. Superior Court, 110 Cal. 45, 42 Pac. 460. I advise that the appeal be dismissed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal is dismissed.

## BANK OF ORLAND v. FINNELL.

Sac. No. 380; March 8, 1899.

56 Pac. 607.

**Findings.—Plaintiff Alleged an Agreement Whereby Third Parties** were to summer-fallow land for defendant, and that defendant should pay plaintiff the reasonable value thereof; that, after said plowing had been completed, said third parties directed defendant to pay plaintiff, and defendant agreed so to do. Defendant alleged execution of a two years lease to such third parties in payment of said agreement, and that plaintiff and such third parties accepted the same in full satisfaction of the claim. Held, to require a finding as to whether, after the plowing was done, defendant, for a valuable consideration, promised to pay plaintiff therefor, as alleged in the complaint.

APPEAL from Superior Court, Glenn County.

Action by the Bank of Orland against John Finnell. From a judgment in favor of defendant and from an order denying a motion for a new trial plaintiff appeals. Reversed.

Ben. F. Geis for appellant; Seth Millington for respondent.

GRAY, C.—The complaint sets forth, in substance, that in August, 1894, it was agreed between plaintiff, defendant, and James and William Deveney that the Deveneys should summer-fallow two thousand five hundred acres of land for defendant, and that defendant should pay plaintiff the reasonable value thereof; that in the summer-fallowing season next ensuing, and subsequent to such agreement, the Deveneys did the summer-fallowing; that it was worth $1.50 an acre, or a total of $3,750. Then follows, in the complaint, this allegation: "That at the time of the entering into the said agreement, after the said plowing had been completed, the said Deveneys, for a valuable consideration, directed the said John Finnell to pay the plaintiff, and the said John Finnel agreed to pay the plaintiff, for the said plowing, as aforesaid." The pleadings were not verified. The answer contained a general denial; also, an affirmative defense, in the nature of a novation, in which it was alleged that in October, 1894, defendant executed a two years lease to the Deveneys

of the land in question, and that plaintiff and the Deveneys accepted the same in full satisfaction and discharge of the claim set up in said complaint. After a finding of plaintiff's corporate capacity, the findings read as follows: "(2) That on the ninth day of August, 1894, the defendant entered into the following agreement, and no other, with the plaintiff and James O. Deveney and William Deveney, to wit: Defendant agreed to lease certain lands, consisting of five thousand acres, more or less, upon the Capay Rancho, in said Glenn county, state of California, unto the said James O. Deveney and William Deveney, for the term of one year from the first day of October, 1894, for a certain rental, and did further agree to pay a reasonable price per acre for any and all summer-fallow plowed by the said Deveneys upon said leased land, during said term of leasing, if said lease should for any cause be terminated and cease at the end of the said one year. (3) That defendant did not agree to pay for said summer-fallow, in any and all events, as in the complaint set out, but only in case the said James O. Deveney and William Deveney should cease to be his tenants at the end of the said term of one year. (4) That under and in pursuance of said agreement the said James O. Deveney and William Deveney did accept said oral lease, and did occupy said lands as tenants, and did summer-fallow two thousand one hundred and thirteen acres of said land. (5) That the reasonable value or price per acre for said summer-fallowing was and is $—— per acre. (6) That during the pendency of said lease, and before said summer-fallowing was done, the defendant did make, execute, and deliver unto the said James O. Deveney and William Deveney his certain indenture of lease, in writing, whereby he did lease all of said lands, theretofore held by them by oral lease, unto the said James O. Deveney and William Deveney for the term of two years from the first day of October, 1894. (7) That the plaintiff and the said James O. Deveney and William Deveney agreed thereto, and did accept said written lease in full satisfaction and discharge of all claims by them against defendant, and of the agreement hereinbefore found and set out, as made by defendant August 9, 1894."

The evidence would seem to be lacking to support that portion of the last finding relative to plaintiff accepting the written lease in satisfaction of the claim of plaintiff for the

value of the plowing under first contract mentioned in the findings; but as there is another ground upon which a new trial must be had, and the evidence may not be the same upon such new trial, it will not be necessary to notice this point any further.

I am of the opinion that the point made in appellant's specifications and brief, that the court failed to find on the issue as to whether, after the plowing was done, defendant, for a valuable consideration, promised to pay plaintiff for it, is well taken. The question is whether the finding that, before the summer-fallowing was done, the execution of a lease for two years superseded the agreement for one year, of August 9, 1894, and so rendered any further finding unnecessary. But the record does not show satisfactorily that the situation was such that the defendant could not bind himself by the express contract charged. It is contended by respondent that the allegation of the complaint quoted above is confined, as to its date, to the time of the first agreement mentioned in the complaint, and must be taken as a part of such agreement, and that that agreement was completely disposed of in the findings. This allegation of the complaint seems to be somewhat ambiguous as to time, but there was no demurrer to it on that or any other ground, so it became the duty of the court to determine what it meant; and, if it was material, the findings should have covered it. It may as well be said that the allegation in question refers to a time after the plowing was completed, as to say it refers to any time prior thereto, and this construction must have been placed upon it by both court and counsel on the trial; for much evidence was introduced on behalf of the plaintiff to show that long after the making of the two year lease, after much of the plowing had been done, and about the last of March or first of April, 1895, the defendant had requested plaintiff to procure a written order from the Deveneys, directing him to pay the price of the plowing, and promised to pay the same. This was denied by defendant on the witness-stand. Plaintiff put in evidence a written order drawn on defendant by the Deveneys, in favor of plaintiff, for the price of plowing. This order was dated in August, 1895; and plaintiff's cashier testified that he had obtained it pursuant to such request of defendant. So that there was a sharp conflict in the evidence upon the question as to whether defendant, after the

plowing had been done, had promised to pay plaintiff for it. The reception of all this evidence shows that the allegation was deemed to be material, and perhaps to refer to a time other than that of the first agreement mentioned in the complaint. We will suppose that the court had, in addition to the facts already found, gone on to say, in the language of the complaint, as follows: "After the said plowing had been completed, the said Deveneys, for a valuable consideration, directed the said John Finnell to pay to the plaintiff, and the said John Finnell agreed to pay plaintiff, for the said plowing, as aforesaid." Would not a judgment for plaintiff on the findings have necessarily followed? This supposed finding would cover a part of the same page with the actual findings, with the utmost harmony, and had the court made such a finding, it is doubtful, from the condition of the record, whether it could have been disturbed on appeal; and certainly the judgment on the findings would necessarily have been for the plaintiff, and directly contrary to the way it is now. All this seems to show, first, that the allegation referred to in the complaint is not covered by the findings as they stand; and, second, such allegation is material, and plaintiff is entitled to a finding upon it. And for these reasons I advise that the judgment be reversed, and a new trial ordered.

We concur: Haynes, C.; Pringle, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and a new trial ordered.

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## SCHWARTZ et al. v. WRIGHT.*

S. F. No. 843; March 9, 1899.

56 Pac. 608.

**Appeal.—Where the Evidence is Conflicting,** and a motion for new trial was denied, the verdict will not be set aside.

**Check.—In an Action on a Check, Defendants Denied Delivery,** and in proof thereof introduced evidence showing that the check was made in payment of certain stock to be delivered, and entry of the

*Rehearing denied.

other parties in the agreement into a pooling contract, and that the check was taken without consent by one of the parties, to whom it had been given for inspection. Held, that evidence of failure of the consideration for which the check was to be given was admissible as tending to show want of delivery.

**Check.—Where the Payee of a Check had Notice** of what was to be done by third parties before the check was to be delivered, evidence of negotiations with such third parties in the absence of the payee of the check is admissible to show nondelivery.

**Evidence.—A General Objection to Evidence of a Certain Conversation** as not had in the presence of one of the parties to the suit was insufficient as affecting certain offensive words used in the conversation, where there was no motion made to strike them out, and they were thereafter repeated to such party in person.

APPEAL from Superior Court, City and County of San Francisco.

Action by Henry Schwartz and others against William H. Wright. Judgment for defendant and plaintiffs appeal. Affirmed.

F. W. Van Reynegom, P. F. Demand and J. J. Roche for appellants; Daniel Titus for respondent.

PRINGLE, C.—Appeal from order denying motion for new trial and from judgment. Action brought upon the following check:

"San Francisco, Cal., Nov. 14, 1894.

"Union Savings Bank of San Jose, Cal.:

"Pay to F. W. Van Reynegom, or order, $3,300—three thousand three hundred dollars.

"WM. H. WRIGHT,
"By H. W. WRIGHT,
"Attorney in Fact.

"Anglo-Cala. Bank:

"Please pay."

The jury rendered a verdict in favor of the defendant. There is a painful conflict of testimony in the case. The defense is that the check was never absolutely delivered, and that there was no completed consideration for it. The facts are peculiar. The testimony on behalf of the defendant is that William H. Wright was anxious to obtain the control of the majority of the stock of the Oceanic Phosphate Com-

pany, and for that purpose entered into negotiations with M. C. Chapman, who undertook to put into his hands 2,707 shares of the stock, the requisite majority being 5,070 shares. Chapman and John A. Magee owned 2,461 shares, but they were in the hands of Judge Van Reynegom, who held them in pledge to secure a note of Chapman and Magee to Bayle, Lacoste & Co. They could be released and put into the pool by payment to Van Reynegom, for Bayle, Lacoste & Co., of $3,300. In order to accomplish this, W. H. Wright agreed to obtain the $3,300, if Chapman would secure other stock to make up 2,707 shares, and would complete the pool of 5,070 shares. The negotiations lasted some weeks, and before they were completed W. H. Wright went to the eastern states, leaving power of attorney with his brother, H. W. Wright, with instructions to complete the transaction. On November 14, 1894, H. W. Wright came from San Jose to San Francisco with W. I. Gill, his attorney, and met Chapman and Magee in the office of Magee. A pooling agreement was prepared in duplicate or triplicate, to be signed by stockholders for 5,070 shares of stock, including Chapman and Magee for 2,707 shares. The arrangement was complicated, and involved the preparation also of two notes by stockholders, which were to aid Wright in obtaining the required $3,300, and also a contract between Wright and Chapman and Magee, by which Wright was to be secured for his advance. The morning was consumed in arranging details, and at 2 o'clock Judge Van Reynegom was sent for to bring the stock held by him in pledge, and complete the transaction. Here the stories diverge. The statement of H. W. Wright and Gill, his attorney, is that the pooling contract was fully and freely discussed in the presence of Judge Van Reynegom and John Lacoste, of the firm of Bayle, Lacoste & Co., as part of the transaction; that Mr. Wright then explained that he had not brought any money, or any certified check, but that he could give his check upon the San Jose Union Savings Bank of San Jose, payable at the Anglo-California Bank in San Francisco, if that would be acceptable, and that he thereupon drew the check in question, and passed it over to Judge Van Reynegom for his inspection; that Van Reynegom took out the certificates of stock held by him, indorsed them, and passed them over to Mr. Gill; that 246 shares were wanting to make up the 2,707 that Chapman and Magee were to sup-

ply; that Chapman took from his pocket 83 shares more, and promised to supply the remaining 163; that all the papers connected with the pooling contract were on the table, and while Wright was signing the pooling papers, and Gill was talking with Chapman about making up the deficiency, Judge Van Reynegom took the check, and retired; that just as Mr. Gill noticed that Van Reynegom had gone out with the check, he learned from Chapman and Magee that they both made objection to signing the pooling contract, whereupon Gill said that it was a fraud and a swindle, and called upon Mr. Wright to go with him to the Anglo-California Bank, and stop the payment of the check, which they did, and then went immediately to the office of Judge Van Reynegom, and used the same strong language, tendering back the stock, and demanding the check; that Van Reynegom expressed surprise at the failure of Chapman and Magee to finish the pooling transaction, and promised not to negotiate the check, and not to part with it "until it was all fixed up satisfactorily." On the other hand, the statement of Judge Van Reynegom is that he never promised to hold the check; that he had no knowledge whatever of any other matter being connected with the transfer of his stock, or the delivery of the check; that the delivery was absolute and unconditional, and that otherwise he would never have parted with the stock. John Lacoste fully corroborates him. These are the strong points of discrepancy. There is great conflict. But the story of the defendant does not necessarily involve what Mr. Gill said, "This is all a fraud." It might well be that Judge Van Reynegom took the check and delivered the stock supposing that all matters between the other parties were, or would immediately be, adjusted; and that obstruction on the part of Chapman unexpectedly arose, and changed the aspect of affairs. But, however that may be, the question was fairly submitted to the jury. The court stated the case from both points of view, and said, "The one great point to be determined here is whether or not there was an absolute or conditional delivery of this check." The verdict was in favor of the defendant. There is clearly conflict of evidence. The motion for new trial was denied by the court in which the trial was had, and the verdict cannot be set aside without violating the well-settled rule of this court.

The appellant claims that errors were committed by the court below in the admission of evidence. Most of these errors are charged to be in admitting evidence to show the whole consideration for or inducement to the giving of the check, as has been stated above. It is to be observed that the true question is not whether there was a sufficient consideration for the check, for, if the check had been unconditionally delivered, its payment could not have been defeated if Wright had relied upon the promise of Chapman to furnish the missing 163 shares of stock and the required signatures to the pooling contract, and he had failed to do so. Hence this evidence, touching the consideration, was admissible, not as tending to show insufficiency of the consideration of a check delivered, but as showing, in a consideration unperformed, a circumstance tending strongly to show that the check was undelivered. And the criticism of the appellant that evidence was admitted of negotiations had between Chapman and Wright when Van Reynegom and Lacoste were not present is not just, because the object of those negotiations was to establish the contemplated consideration; and it was sufficient to require, as the court in its ruling very plainly did, that Van Reynegom and Lacoste had notice of all that was to be done before the check was to be delivered. Negotiations uncompleted, with notice to the payee of the want of completion, would certainly be a strong circumstance tending to show that the transaction was not ripe for completion. The payees need not have been present at all such negotiations if they were seasonably affected with notice of them.

Appellant insists also upon the fact that Judge Van Reynegom and John Lacoste were not parties to the pooling contract, and hence could not be affected by any evidence concerning that contract or the two promissory notes that were to be signed with it. But the answer to this is involved in the answer to the last position. The pooling contract was to be a part of the consideration for the check; and the failure to complete it within the knowledge of appellant's assignors was a circumstance tending to show that there was no intention to deliver the check. It is claimed that there was no issue in the pleadings under which this evidence was admissible. But it tended to sustain the averment that there was no delivery of the check.

Appellant contends that it was error to admit the statement of Mr. Gill of his conversations with Chapman and Magee in the office of Magee after Judge Van Reynegom and John Lacoste had left with the check. But those were the conversations by which Chapman and Magee both refused to sign the pooling contract. It became necessary to show them as an important ingredient in the failure to complete the consideration. Connected with this statement of facts is the declaration made by Gill, upon Magee's declining to sign: "Mr. Wright, let us go to the bank and stop that check. This is a fraud and a swindle"—the admission of which is relied on as error. There was no motion made to strike out this characterization of the transaction. A general objection to allowing the witness to state what happened in the absence of Van Reynegom and Lacoste preceded these statements of Mr. Gill. But the objection was not good, and no objection was made separately to these offensive words by motion to strike them out. Besides, the same expressions were repeated by Mr. Gill in the presence of Judge Van Reynegom and went to the jury without objection. The rights of appellant's assignors were fully protected by the following charge: "I have instructed the jury that, if it was known to Judge Van Reynegom and Mr. Lacoste that something else was to be done at the time of the giving of the check, then it was a conditional delivery, and Mr. Wright would not be liable unless that agreement was carried out. I do not mean to instruct them as to any secret understanding in Mr. Wright's mind or Mr. Gill's mind, but it must have been an agreement that was understood by all of the parties."

Other points are made by appellant, presenting in different aspects objections to the admission of evidence and to the instructions given by the court, but they are sufficiently answered by the above. I advise that the judgment and order appealed from be affirmed.

We concur: Britt, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

## BAYLEY v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

**S. F. No. 857; March 18, 1899.**

**56 Pac. 638.**

**Appeal.—A Finding by the Jury on Conflicting** evidence will not be disturbed.

**Insurance.—The Fact That an Accident Insurer had Waived** a false statement that the insured had never before received compensation for any accident, in so far as it had paid him therefor in 1892, and knew of certain other like payments by third persons in 1892, does not waive the falsity of the statement in that prior compensations for accidents had been paid the insured in 1886, of which the insurer had no knowledge.

**Insurance.—The Objection of Immateriality cannot be Urged** against a warranty in a policy so as to avoid the effect of a breach thereof.

APPEAL from Superior Court, City and County of San Francisco.

Action by G. B. Bayley against the Employers' Liability Assurance Corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Van Ness & Redman for appellant; Stanley, Hayes, McEnerney & Bradley for respondent.

PER CURIAM.—This is an action upon a policy of accident insurance. The verdict and judgment were for plaintiff, and defendant appeals from the judgment and order denying a new trial.

The assured, George H. Bayley, was killed by an accident, and this action is brought by his widow, Gertrude B. Bayley, who was the person in whose favor the policy ran. At the trial all of the defenses set up in the answer were waived, except two: (1) That the insured represented in his written application for the policy that he had never proposed and been declined insurance by an accident insurance company, and that this was not true; and (2) that he represented in said application that he had never received compensation for any accident, whereas he had, in November, 1892, and

also in the year 1886, received compensation from other accident insurance companies on account of injuries he had sustained by previous accidents.

As to the first defense, it is sufficient to say that the evidence as to that defense was materially conflicting, and that, therefore, the finding of the jury upon the issue cannot be here disturbed.

2. The application upon which the policy was issued contained the following: "Said policy to be based upon the following statement of facts, which are to be considered as warranties." The fourteenth statement in the application is as follows: "I have no other accident insurance covering weekly indemnity except as herein stated: Aetna, ten thousand dollars." The fifteenth statement is as follows: "I have never received compensation for any accident except as herein stated"; and there was no statement as to any compensation having been received; and the statement, as thus expressed, was clearly that he never had received any prior compensation for an accident. But it was proven beyond doubt that he had received compensation for an accident in 1892, and also in 1886, and therefore the statement was false. This false statement, being a warranty, relieved the appellant from any liability on the policy, unless certain other principles of law intervene to prevent that result. Respondent contends that at the time the statement was made the appellant knew that respondent had before that received certain compensations for an accident, and that the appellant, having received the premium and issued the policy with a knowledge that the statement was false, thereby waived it. There is no doubt that the principle contended for by respondent as to the waiver is well established. In Menk v. Insurance Co., 76 Cal. 53, 9 Am. St. Rep. 158, 14 Pac. 839, and 18 Pac. 117, Mr. Justice Temple, delivering the opinion of the court in bank, said: "Nor would misstatements be fatal to the claim of plaintiff which the agent well knew to be false when he made out the application, received the money of the applicant, and issued the policy. The tendency of the decisions is, plainly, to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered; otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable

fraud: Kruger v. Insurance Co., 72 Cal. 91, 1 Am. St. Rep. 42, 13 Pac. 156." In Bacon on Benefit Societies and Life Insurance (vol. 2, par. 427) it is said: "And if, when the insurance company issues the policy, it knows that certain answers in the application are falsely answered, it waives the right to object by such issue"; and the text is amply sustained by the authorities: See Van Schoick v. Insurance Co., 68 N. Y. 434; Gray v. Association, 111 Ind. 531, 11 N. E. 477; Schwarzbach v. Protective Union, 25 W. Va. 622, 52 Am. Rep. 227. This principle might be successfully invoked by respondent so far as the compensations for a former accident in 1892 are concerned, for it appeared that the appellant itself had paid some of those compensations, and that it also knew that other compensations were paid in that year by one or two other companies. And it might well be held to have waived the fact that respondent had received compensations for the accident which occurred in 1892. But respondent had also received compensations for an accident which occurred in 1886, of which appellant had no knowledge whatever; and there is no principle upon which it can be held that a waiver of compensation for one particular accident, of which the appellant had knowledge, was also a waiver of the fact of prior compensations for accidents of which appellant had no knowledge. Appellant might well have overlooked the circumstance that respondent had been once before injured, and had received compensation for an accident, while the fact that on other occasions, or even upon one other occasion, he had received compensations for accidents upon one or more other policies might have been considered by the appellant as a very material objection to him as an applicant for insurance. Moreover, the statement was a warranty, and the objection of immateriality cannot be urged against a warranty, unless in very exceptional instances; and, although a warranty may be waived, there was no waiver in the case at bar except as to the compensations received in 1892. The judgment and order denying a new trial are reversed and the cause remanded for a new trial.

## McPHERSON v. SAN JOAQUIN COUNTY.

Sac. No. 498; March 24, 1899.

56 Pac. 802.

**Well Contract.—In an Action on a Well Contract, Where Plaintiff** alleged that he was prevented from finishing the well because of defendant furnishing unsuitable casing, which collapsed and stopped up the well, an allegation that plaintiff offered to dig another well without profit, at its actual cost, was unnecessary to the cause of action, and ineffectual as an offer to perform.

**Well Contract.—Where a County Having a Well Bored was to Furnish** the casing, the presumption that it should be suitable and of proper strength is not overcome by Civil Code, section 1654, providing that an uncertainty in a contract between a public body and a private person shall be presumed to be caused by the latter, and most strongly construed against him.

**Well Contract.—Specifications for a Well Contract Provided** that all materials should be of the best quality and suitable. Held, that this applied to the casing to be furnished by the county having the well bored, as well as to the material furnished by the contractor.

**Well Contract.—In an Action on a Well Contract, a Count for Extra Work** caused by and on account of improper casing furnished by defendant having the work done states a cause of action.

**Well Contract.—Where, Under a Well Contract, the Owner Could Stop** the work at any time, the contractor cannot recover damages for being prevented from completing the contract by the owner's furnishing defective materials, this not being done willfully.

**Well Contract.—In an Action Against a County on a Well** contract, the petition alleged that the county entered into the contract, acted on it, and made payments under it; and the contract recited that the county made it through its duly authorized agent. Held, on demurrer, that the petition was not bad as not setting out the authority under which the agent acted.

**Well Contract.—A County cannot Escape Liability Under Its Contract** to furnish suitable casings for a well being bored for it because of the neglect of duty of its officers in selecting the casings.

APPEAL from Superior Court, San Joaquin County.

Action by J. K. McPherson against San Joaquin county. There was a judgment for defendant and plaintiff appeals. Reversed.

Louttit & Middlecoff for appellant; W. B. Nutter for respondent.

CHIPMAN, C.—Action upon contract. The complaint alleges that plaintiff and defendant entered into a written contract by which plaintiff agreed to bore, for the use of defendant, "a well for flowing water and gas in accordance with the specifications prepared therefor." Plaintiff agreed to furnish all necessary tools and labor for the work, and bore the well to the depth of two thousand feet, unless defendant "direct the discontinuance of the work." The size of the bore of the well was to be twelve inches, carried down to the greatest possible depth. Where changes were found necessary in the size of the bore, in going down, defendant was to have the right to decide as to such changes. The contract provided "that the casing to be used in said well should be furnished by the said party of the first part [defendant], . . . . and shall be selected and designated by the said party of the first part." Usual covenants were given by plaintiff to make the work first-class in all respects. Plaintiff was to keep an accurate account of developments in striking water or gas as the work progressed, and report fully to defendant the results obtained. Plaintiff was to be paid at the rate of $2.25 per foot for the first one thousand feet, $2.50 per foot for the next five hundred feet, and an increased amount per foot as the well was deepened. The contract also further provided: "The total number of feet of said well to be bored being two thousand feet, unless a sufficient flow of gas shall be found at a lesser depth, or work be sooner suspended by" defendant. A provision required plaintiff to make a statement to defendant on the first of each month of the number of feet completed the preceding month, and, if found correct, the account should be approved by defendant, and a warrant issued to plaintiff for the amount due, less twenty-five per cent reserved until full completion of the contract. Full and detailed specifications were made part of the contract. In the specifications is the provision following: "The casing to be furnished to the contractor, delivered on the grounds; he to place the same in position. . . . . All casing and steel shoes for the well will be furnished by the board of supervisors." It was provided that, if the work should be discontinued

by defendant, plaintiff was to "be entitled to the full payment of such portion of the work as has been satisfactorily completed, at rates that have been agreed upon in the contract"; defendant reserving the right to order the work stopped at any time. The complaint alleges "that plaintiff duly performed all the conditions on his part to be performed under said contract until said well was bored and completed to a depth of eleven hundred feet," about July 10, 1897; " . . . . that the casing selected, designated and furnished by said defendant to plaintiff to be used in said well was of such inferior quality that on said day said casing, without any fault on the part of plaintiff, and while plaintiff was in the due performance of his part of said contract, failed, collapsed, gave way and obtruded itself into said well and stopped up said well at a point about one thousand feet in depth in said well to such an extent that it was impracticable and impossible for plaintiff to further proceed with the boring and completion of said well; that, prior to the time that plaintiff had used said casing which failed . . . . and obtruded itself into said well as aforesaid, said plaintiff had warned said defendant and its officers and agents that said casing was insufficient and unfit to be used in said well, and had protested against being required to use the same in said well, but said defendant had required said plaintiff to proceed to use said casing in said well, and had refused to procure proper casing to be used in said well." At this point in the complaint it is alleged that, after the casing collapsed as stated above, plaintiff offered to bore a new well, without profit to him, to the depth of one thousand feet, if defendant would furnish casing and pay the actual expense of boring the well, and from that point plaintiff would proceed to complete the new well under the terms of the contract. This clause was stricken out on motion. The complaint then alleges that the sum of $2,500 was due for boring the well to the depth of eleven hundred feet, no part of which has been paid, except $1,875.01, leaving due the sum of $624.99. Allegations are made showing that the claim was duly presented, and was rejected by the supervisors. A second count alleges the sum of $250 to be due for extra work caused by and on account of the improper casing furnished plaintiff. A further claim is also made of $500 damages for being prevented from com-

pletely performing the contract. Judgment was entered for defendant on the general demurrers to the several counts, from which, and also from the order granting the motion to strike out the clause above noted, plaintiff appeals.

1. The motion to strike out was properly granted. The objectionable matter was not necessary to the cause of action alleged in the complaint. If it was intended as an offer to perform, it failed of that object, for it was entirely different from the contract and was, in effect, an offer to dig a new well on different terms.

2. Respondent claims that defendant had the right to select the casing, and, if it erred in exercising its discretion, that fact gave plaintiff no right of action. Respondent invokes section 1654 of the Civil Code, which provides that where uncertainty exists in a contract between a private party and a public officer or body, as such, the uncertainty is presumed to be caused by the private party, and the contract must be interpreted most strongly against the private party. We can discover no uncertainty in the provision that defendant was to supply the casing. If there is any uncertainty, it is as to whether defendant was at liberty to furnish unsuitable casing. It is claimed that in the contract defendant did not in terms agree that the casing shall be of proper strength and suitable for the purpose. But this would be implied, and no presumption should be indulged, under section 1654, to overcome an implied covenant so obviously just. When defendant undertook to furnish casing, it agreed to furnish casing suitable for the purpose. But in the specifications is a clause which, fairly construed, we think, in terms put upon defendant the duty to furnish suitable casing. It reads: "The bidder to whom the contract may be let will be required to enter into an agreement . . . . to furnish and erect machinery and plant of the most approved kind, and all tools and materials of every description used in the prosecution of the work shall be of the best quality and suitable for the services to be performed, so that every possible security may be afforded to guard against accidents, so that the work may be successfully prosecuted and speedily completed." Quite as much depended upon having suitable casing, as in having suitable machinery with which to do the work; and this clause refers to the materials to be used, as well as to the

machinery. Respondent contends that it was plaintiff's duty to use any casing furnished, and, if it happened to be worthless and wholly unsuitable, it was still his duty to use it, and take the consequences, to which the maxim, "Damnum absque injuria," applies. This contention is neither sound in law nor in morals. Respondent makes the same, but no other, objections to the second count. We think a good cause of action is stated for the extra work. As to the claim for damages, we find nothing in the contract to support it. Defendant reserved the right to terminate the contract at any stage of the work. When the casing collapsed, the work ceased, and defendant refused to allow resumption of any further boring of the well. We do not think plaintiff is entitled to recover for profits he might have made on the unfinished portion of the well. If it had been alleged that defendant willfully, and for the purpose of evading the contract, caused the bad casing to be used, it might be otherwise; but, so far as the complaint shows, it was the bad judgment of defendant, honestly exercised, that caused the trouble.

3. Respondent contends that the complaint is insufficient because it fails to show that the contract was made by authority of defendant. This contention rests upon the recital in the contract that it was entered into "by and between the county of San Joaquin, state of California, by and through James Brown, the duly authorized agent of said county for said purpose, party of the first part," and plaintiff, the second party. The contract is signed: "James Brown. J. K. McPherson"; the attestation reading: "In witness whereof, the said parties have caused this instrument to be properly subscribed." The complaint alleges that the contract was entered into by defendant. Respondent cites section 2 of the act of April 1, 1897 (Stats. 1897, p. 452), which provides that the power of a county "can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." It is claimed that the contract set forth in the complaint shows that it was executed by an agent of the county, and it therefore became necessary to allege the authority under which the agent acted. Furthermore, it is claimed that while, under the allegations, the proof at the trial might have shown authority, still, upon demurrer, the complaint

is insufficient; citing Murphy v. Napa Co., 20 Cal. 497; House v. Los Angeles Co., 104 Cal. 79, 37 Pac. 796; Jerome v. Stebbins, 14 Cal. 457; Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492, and other cases. This is not an instance of powers delegated to an agent, as was that in 104 Cal., 37 Pac., supra, nor is it a case where there is a failure to allege every fact essential to be proved, as were the other cases cited. Here the allegation is that the county entered into the contract, and the contract itself recites that the county made it by and through its duly authorized agent. The complaint also shows that the county acted under the contract, and made payments for work done under it. We think the allegations were sufficient. Defendant's point must be made by the answer, and upon the trial.

4. It is next contended that the county is not liable for the neglect of duty of its officers; citing Crowell v. Sonoma Co., 25 Cal. 316; Santa Cruz R. Co. v. Santa Clara Co., 62 Cal. 180; Chope v. City of Eureka, 78 Cal. 588, 12 Am. St. Rep. 113, 4 L. R. A. 325, 21 Pac. 364, and other like cases. The cases cited are actions arising out of the tortious acts of public officers, and are not in point. The cause of action here arises from breach of contract. Defendant cannot escape liability by setting up its neglect of duty in failing to perform its part of the contract. Even actions for damages arising out of the neglect of public officers, formerly held not to be maintainable, are in some cases now allowed, under the new constitution: Tyler v. Tehama Co., 109 Cal. 618, 42 Pac. 240. See, also, Denning v. State, 123 Cal. 316, 55 Pac. 1000. The judgment should be reversed, with directions to overrule the demurrer.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed, with directions to overrule the demurrer.

## PEOPLE v. GONZALES.

Cr. No. 477; March 28, 1899.

56 Pac. 804.

**Robbery—Information.—A Variance Between the Name** of the owner of the property, as given in an information for robbery and as shown in evidence, is immaterial.

**Robbery—Evidence.—In a Prosecution for Robbery, the Owner** of the property testified that defendant knocked him down, rendering him insensible, and that on recovering consciousness his purse and watch were missing. Another witness testified that he saw defendant holding the owner of the property on the ground. No one distinctly saw defendant rifle the latter's pockets, nor was the property found in defendant's possession. Held, that a conviction was justified.

**Criminal Law—Instructions—Appeal.—Where the Court,** of its own motion, gives an instruction based on a contention which it states was made on the trial, it cannot be presumed on appeal, in the absence of such fact being affirmatively shown by a bill of exceptions, that the contention was not made.

APPEAL from Superior Court, Santa Clara County.

Jack Gonzales was convicted of robbery, and he appeals. Affirmed.

H. E. Wilcox and D. M. Burnett for appellant; Attorney General Ford for the people.

PER CURIAM.—Gonzales (the appellant here) and one Fernandez were charged by information with the crime of robbery, committed by forcibly taking from one P. Santonette a brass watch and also the sum of $40 in money, the personal property of said P. Santonette. Gonzales was tried separately, and convicted. At the trial it appeared that the true name of the person called P. Santonette in the information is Peter Latonette. He testified, however, that he is known by the name of Pete Santonette, and was so known to Gonzales at the time of the alleged robbery, and gave that as his name on the preliminary examination of this case. It further appeared from his testimony that he came from his residence in the Santa Cruz mountains to the city of San Jose "for amusement and rest," and to promote these objects he formed the acquaintance, on the night of the al-

leged robbery, of said Gonzales and Fernandez, and also of one Pitts. All took several drinks at the expense of Santonette, after which, as the four persons named were walking along one of the streets of the city about the hour of 12 midnight—Pitts being a few paces behind the others—Santonette received a blow on the head, struck by Gonzales, and fell to the ground, where he remained insensible about fifteen minutes. When he recovered consciousness, he was alone, and then missed his purse, containing $40, which he had carried in his pocket, and his brass watch, which he wore when he was knocked down. He immediately complained to the police. Said Pitts testified: That a scuffle occurred between Santonette and Gonzales. He saw Gonzales holding the former on the ground. "I can't swear positively that he went through the man's pockets, but the best of my knowledge is that he did. I believe this from the way they acted. It was so dark I could not see well." That they left Santonette lying on the ground where he fell. A certain police officer testified to a declaration of Gonzales to the effect that Santonette insulted him, and he (Gonzales) knocked him down. Rosia Garcia, a witness for defendant, testified that Pitts came to her house about 1:30 A. M. of the night in question, and said he and Gonzales had robbed a man; that he (Pitts) struck him, and Gonzales "went through his pockets." Other evidence produced on either side need not be stated. It must be assumed, in support of the verdict, that the jury found the testimony on behalf of the prosecution to be true. Among the instructions of the court to the jury was the following matter: "It is contended in this case that the witness Pitts was an accomplice in the commission of a robbery, if it was committed, and therefore his testimony should not be considered by the jury, unless corroborated by other facts and circumstances in the case." The court then stated to the jury the rule forbidding a conviction on the uncorroborated testimony of an accomplice, in the language of section 1111 of the Penal Code.

1. It may be, as defendant claims, that the name of the owner was a necessary part of the description of the property taken (People v. Hughes, 41 Cal. 234); but no objection to the information was taken, by demurrer or otherwise. It was no material variance when it appeared in evidence

that his true name was something different: People v. Woods, 65 Cal. 121, 3 Pac. 466; People v. Armstrong, 114 Cal. 570, 46 Pac. 611. See People v. Prather, 120 Cal. 660, 53 Pac. 259, and People v. Plyler, 121 Cal. 160, 53 Pac. 553.

2. Defendant urges that the evidence was circumstantial, and insufficient to show either that a robbery was committed or that he was guilty thereof. It is true that no one distinctly saw defendant rifle Santonette's pockets, nor was the property of Santonette found in defendant's possession; but the property was taken from him, the evidence tended to show, after he was knocked down, and before he recovered consciousness, and why was Gonzales "holding him on the ground," as Pitts testified? Hardly for the purpose of preventing violence at his hands, for, according to Santonette's testimony, he was then insensible. We are satisfied that this court is not warranted in interfering with the conclusion drawn by the jury from the evidence.

3. The court gave an instruction, correct in point of law, upon the kind and character of corroboration necessary to support the testimony of an accomplice before conviction could be had. It introduced the instruction by the following sentence: "It is contended in this case that the witness Pitts was an accomplice in the commission of a robbery, if it was committed, and therefore his testimony should not be considered by the jury, unless corroborated by other facts and circumstances in the case." It is said of this that the instruction was given by the court of its own motion, that no such instruction was asked by either the people or the defendant, and that no such contention as that Pitts was an accomplice was made by either party in the action. The injurious effect of the language is pointed out, and that effect may be conceded. While it is true that there is nothing in the record to show that such a contention was in fact made, upon the other hand there is nothing in the record to show that such a contention was not made. Error will not be presumed. If, in truth, no such contention was made, it was incumbent upon the appellant to have made that fact appear by a bill of exceptions. Failing to do so, the presumption must be that the instruction was addressed to a theory of the evidence advanced in the argument; and, if such was the case, no error could be predicated upon it. The order and judgment appealed from are affirmed.

## WOLTERS et al. v. ROSSI et al.*

S. F. No. 1277; March 21, 1899.

57 Pac. 73.

**Fraudulent Conveyance—Transfer to Wife.**—A transfer of property by an insolvent judgment debtor to his wife without consideration, made after an order for his examination in supplementary proceedings had been served, and on the day before that set for the hearing, is fraudulent.

**Fraudulent Conveyance—Transfer to Wife.**—The day before the one set for his examination in supplementary proceedings, which was the last day in February, a judgment debtor gave money to his wife, who deposited it in a bank, which issued to her a negotiable certificate of deposit. Several days thereafter the creditor commenced an action to set aside the transfer of the money, and on the trial a witness testified that about February or March the debtor had given witness the certificate, and thereafter the latter had turned it over to another. Held, that a finding was justified that the certificate was transferred before commencement of the action.

**Actions.—On the Entry of Judgment on an Order of Plaintiff Dismissing** the action before an answer seeking affirmative relief has been filed, the court loses jurisdiction, and cannot thereafter vacate the judgment on application of defendants, and consolidate such action with another.[1]

**Depositions.—Where Neither the Parties nor the Issues** in two different actions are identical, depositions taken in one are inadmissible in the other.

**Depositions.—Depositions Taken in One Action are Inadmissible** in another as against a party who had no opportunity to cross-examine the witnesses.

APPEAL from Superior Court, Fresno county.

Action by Henry Wolters and others against Lena Rossi and others. From a judgment for defendants and from an order denying a new trial, plaintiffs appeal. Affirmed.

The original complaint herein was filed March 15, 1895. On April 1, 1895, the summons was filed showing proof of

*For subsequent opinion in bank, see 126 Cal. 644, 59 Pac. 143.

[1] Cited with approval in Palace Hardware Co. v. Smith, 134 Cal. 385, 66 Pac. 476, where it is distinguished from a case the plaintiff in which asks for the vacation of a judgment of dismissal, previously ordered on a motion by such plaintiff, made under a mistake or inadvertence.

service on the defendants Lena Rossi and C. Rossi on March 20th, and on the defendant the Farmers' Bank on March 18th.

Geo. B. Graham and Frank H. Short for appellants; H. H. Welch, L. L. Cory and A. M. Drew for respondents.

HENSHAW, J.—These appeals are from the judgment and from the order denying plaintiffs' motion for a new trial. Defendant C. Rossi was a judgment debtor of plaintiffs. On January 29, 1895, an execution issued upon the judgment of plaintiffs was returned nulla bona. On the twenty-third day of February following plaintiffs instituted proceedings supplementary to execution, and secured an order for the examination of C. Rossi and his wife, the defendant Lena Rossi. The examination was held upon February 28, 1895, before a referee. Rossi and his wife were examined. Upon the examination it was disclosed that upon the day preceding (February 27th) Lena Rossi had obtained from her husband, through the Bank of Central California, the sum of $1,652.19, and that she had deposited this money in the Farmers' Bank at Fresno, taking a certificate of deposit negotiable in form in her name. The certificate of deposit bore date March 1, 1895. Upon March 2, 1895, the court made its order restraining the Farmers' Bank of Fresno and Lena Rossi from making any transfer, use or disposition of the moneys represented by the certificate of deposit until further action of the court in the premises. Upon the same day this restraining order was served upon the defendants, and, a second execution having been issued upon the judgment, the bank was garnisheed. Leave was given to the plaintiffs to prosecute an action against the defendants Rossi and the bank to avoid the gift of the moneys by the husband to his wife, as being in fraud of the rights of plaintiffs, judgment creditors of the husband, and this action for the indicated purpose was promptly commenced. In addition to the facts which have already been recited, the complaint averred the gift by Rossi to his wife of the money in question, his insolvency at the time of the gift, and charged that the certificate of deposit from the date of its issue and delivery to the wife, Lena Rossi, until the commencement of the present action, was in the possession and control of the defendants Lena Rossi and C. Rossi, and

that they remained in full ownership and control of the certificate and of the money. It was also alleged that the gift was made with the intent to hinder, delay and defraud the plaintiffs. Upon the trial the defendants offered no evidence. The facts proved or admitted were that plaintiffs were judgment creditors of C. Rossi, and that their judgment was in full force and effect; that defendant Rossi was insolvent; that an execution issued upon plaintiffs' judgment had been returned nulla bona; that, after service upon him of the order of examination upon the day preceding the date upon which the examination was held, he had given to his wife, without valuable consideration, the sum of $1,652.19, which she had deposited in the Farmers' Bank, taking a certificate of deposit therefor, as above stated. The court, however, found that this gift to the wife was not made in fraud of the rights of any of the creditors of C. Rossi, nor with any intent upon the part of C. Rossi to hinder, delay or defraud those creditors.

As the law of this state now stands, the undisputed facts in this case would conclusively establish a fraud against the creditors: See section 3442, Civil Code, as amended in 1895. At the time of the commencement of this action, however, such a transfer by an insolvent debtor was not deemed conclusively fraudulent, and whether or not the transfer was made with a fraudulent intent was a question of fact for the judge or jury. Upon that state of the law respondents contend that the finding of the court is fully justified, and they argue that our decisions declare that conclusive evidence of fraudulent intent upon the part of the donor or grantor is not established by proof merely that he was insolvent, and that the grant or gift was made without valuable consideration. But an analysis of the cases upon which respondents rely will demonstrate that they lend little solace or support to the proposition for which they contend. The code and fraudulent conveyance act at the time when those cases were decided, and at the time when this suit was commenced, declared that no transfer or charge could be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. In McFadden v. Mitchell, 54 Cal. 628, there was under review an instruction which was in direct violation of the code provision, and which declared that, if there was no valuable consideration for the trans-

fer, it was void. While condemning this instruction, as of needs it must, this court said: "Inadequacy of price and insolvency of a debtor may be circumstances more or less potential in the determination of fraud as a question of fact, but failure of consideration is not in itself sufficient to justify a court in finding fraud as matter of law." In Jamison v. King, 50 Cal. 132, it is said: "Doubtless the concurrence of insolvency on the part of the assignor, and inadequacy of price, would be a circumstance strongly tending to establish fraud, but inadequacy or failure of consideration is not of itself sufficient." In Threlkel v. Scott, 89 Cal. 351, 26 Pac. 879, the discussion was upon the necessity of alleging a fraudulent intent in the complaint, and it was held to be an indispensable averment, since, as says this court arguendo: "The fraudulent intent which is itself a question of fact cannot be inferred from the facts stated in the complaint . . . . for the further reason that a voluntary conveyance by an insolvent debtor is not necessarily fraudulent and void as to creditors." In Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557, the refusal of the trial court to set aside as fraudulent and void a deed of gift of real property, made by the defendant to his wife more than five years before execution upon the judgment was returned unsatisfied, was upheld by this court principally upon the ground that the evidence failed to show that at the time of the gift the defendant was insolvent. In Knox v. Moses, 104 Cal. 502, 38 Pac. 318, the trial court found that a voluntary conveyance by Bray, an insolvent, had been made without fraudulent intent, and upon a review of the evidence this court upheld the finding. But in that case the evidence in support of the transfer showed that, at the time the deed was made, Bray, the grantor, was engaged in business affairs of large moment; that his assets and liabilities each approximated $700,000; that he did not know that he was in an insolvent condition; that the deed was to land of trifling value, as compared with his assets; that he was residing with his family upon land of greater value, which he did not homestead, and which passed to his creditors; and that he carried on vast business enterprises for three years and a half after the date of the transfer. In Bull v. Bray, 89 Cal. 286, 13 L. R. A. 576, 26 Pac. 873, the court made certain findings, but failed to find the ultimate fact as to the fraudulent

or nonfraudulent intent with which the conveyance was made, and this court held that such a finding was necessary, and that the ultimate fact of a fraudulent intent did not necessarily and conclusively follow from the facts found, saying: "Bray did actually defraud Bull in the making of the deeds by depriving him of property which would otherwise have been applied to the satisfaction of the execution; but it does not necessarily and conclusively follow therefrom that the intent was present in his mind to defraud, or that in making the transfer he may not have been actuated by the most honest motives." In that case the facts appeared as in the case of Knox v. Moses, just preceding. And a most significant and persuasive fact against the argument of fraudulent intent was the finding of the court that at the time of the conveyance Bray was not aware of his insolvency. In the concurring opinion of Chief Justice Beatty in that case it is said: "When an insolvent debtor makes a gift of his property to a donee of his own selection, there can be but one result, so far as his creditors are concerned. They are necessarily deprived of what is lawfully theirs, and the law ought to pronounce such a transaction ipso facto fraudulent and void as to them." Five years after this utterance the legislature, in consonance with it, has so declared. Still further it is said: "There should be no hesitation in stating and in everywhere insisting upon the proposition that a voluntary conveyance by an insolvent debtor is prima facie proof of a fraudulent intent, which throws upon the donee the necessity of rebutting the inference of fraud."

Such a rule may be adopted without doing the slightest violence either to the letter or to the spirit of section 3442 of the Civil Code. By that portion of the section which we have been considering it is declared merely that a transfer cannot be adjudged fraudulent solely on the ground that it was not made for a valuable consideration, and this court has said, as logically it was compelled to say under that law, that the establishment of the fact of insolvency, with the fact of a voluntary gift, did not conclusively prove the fraudulent intent. In some of the cases above adverted to are shown circumstances which were deemed sufficient to overcome the presumption or prima facie showing of fraudulent intent which is thus established. For example, in Bull v. Bray, supra, while the gift was a voluntary gift, and made

by an insolvent, the other facts in evidence, that the insolvent did not know of his insolvency, that he was a man of large business affairs, and that he conducted these affairs for years after the date of the gift, were sufficient to overcome the prima facie showing. In Jamison v. King, supra, the gift partook of the nature of a gift causa mortis, and was not wholly without consideration, but was made, at least in part, in cancellation of a pre-existing debt. So, while the fact that a voluntary gift was made by an insolvent was not, under our law, sufficient to establish conclusively the fraudulent character of the gift—conclusively, in the sense that no circumstances of explanation or extenuation would suffice to change, in the eye of the law, the character of the transaction (which is the present situation under the code) —it has not been held, and never could reasonably have been held, that the unexplained fact that an insolvent makes a voluntary gift, whereby his creditors are in fact defrauded, did not compel a recognition of a fraudulent intent.

In the case at bar we have, however, not alone the unexplained circumstance of a gift made by an insolvent without consideration, but we have the added fact that the defendant made the gift to his wife after an order of examination had been served upon him, and upon the day before he was called upon to testify under that order. No other conclusion can reasonably follow these unexplained facts than that the gift was made with the intent to defraud the rights of the plaintiff creditors, and, in this view of the evidence, the finding to the contrary is wholly unsupported.

Another of the findings of the court assailed by appellant is to the effect that the certificate of deposit was not continuously after its issuance, and was not at the date of the commencement of this action, in the possession or control of the defendants Rossi, or either of them, and that the ownership thereof had been transferred to other persons. The importance of this finding is at once apparent when it is considered that the purpose of the action is to obtain a judgment that the $1,652 represented by the certificate is the money and property of C. Rossi, applicable to the payment and satisfaction of plaintiffs' judgment, and that a decree is sought ordering the Rossis and the Bank of Fresno to apply the money to this end. It is well settled that a certificate of deposit such as was issued in this case

is a negotiable instrument, which affords a continuing security to the holder. It is not regarded as overdue and dishonored until after presentation for payment. The date of its maturity is the date of such presentation. "The certificate is payable when payment is demanded by the party entitled to receive the money, and who avouches the fact by producing the instrument with evidence of title": Daniel, Neg. Inst., sec. 1707. Where money has been placed on general deposit in a bank, and a negotiable certificate of deposit has been issued to the depositor for the amount, there is nothing left in the possession of the bank belonging to the depositor upon which an attachment issued against his property can fasten. The bank by the certificate becomes liable, not to refund to the depositor the specific money deposited, but to pay the amount of the deposit to the holder of the certificate, whoever he may be, on presentation: McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655. Equity, however, may restrain the transfer of such negotiable instruments, and order them subjected to such disposition as it may deem just, but before this course can afford the slightest relief it is apparent that the restraining order must be served upon the present holder of the instrument. Only so may the difficulty be met, for the promise of the bank is out, and it is a promise to pay the holder of the certificate upon presentation, and this obligation is unaffected by any litigation in which the instrument is involved, unless the instrument and the party in possession of it are before the court. Plaintiff in this case met the difficulty by his averment that the certificate of deposit remained at all times in the ownership and possession, custody and control of the defendants Rossi. The court found to the contrary. The only evidence upon the subject is that of the witness B. T. Scott. He testified: "About the month of February or March" Mr. and Mrs. Rossi drove up to his store, and gave him the certificate of deposit indorsed by Mrs. Rossi, and told him to collect it if he chose and use it in his business. Afterward he was instructed to turn the certificate over to W. Rigby for collection, and he did so. He did not know upon the trial where the certificate was, nor what had become of it. This being all the evidence in the case upon the question, it is clear that at the time of the trial the outstanding certificate might have passed

through a dozen hands, and might be held by a bona fide purchaser for value and without notice. Certain it is that the Rossis had parted with the custody and control of it, and that any bona fide holder without notice would be entitled to receive from the bank the amount of money named in it. This evidence, then, supports the finding of the court. The restraining order and garnishment were served upon the bank, as in the case of McMillan v. Richards, after the issuance of the certificate of deposit. The plaintiffs have failed in their attempts to seize or impound the certificate. A judgment in this case compelling the bank to pay the money to the plaintiffs would not protect it against a future demand by the holder of the certificate. The plaintiffs, therefore, have unfortunately failed in their effort to grasp the corpus of the property, and cannot obtain their desired judgment.

It is plaintiffs' contention, however, that, but for an error of the court, Rigby, the last-known holder of the certificate, would have been before the court, and that by showing that he was not a bona fide holder of the certificate they would have proved themselves entitled to the moneys in bank. This contention grows out of the following state of facts: After plaintiffs had instituted this action Rigby commenced suit against the bank, averring that he was the holder of the certificate of deposit, and that the bank, after presentation and demand, had refused payment. The bank applied to the court for leave to deposit the amount named in the certificate in court to await its action, and asked that upon such deposit it be dismissed from the action, and plaintiffs in this case be substituted in its place and stead. The order was made accordingly. Thereafter, and before any answer seeking affirmative relief upon the part of the defendants was on file, Rigby dismissed his action, and procured the entry of a judgment of dismissal in due form. Upon the entry of this judgment the action was finally at an end, and the court lost jurisdiction of it: Page v. Page, 77 Cal. 83, 19 Pac. 183; Acock v. Halsey, 90 Cal. 215, 27 Pac. 193; Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298; Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904; Evans v. Johnston, 115 Cal. 180, 46 Pac. 906. Notwithstanding the fact that the Rigby action had thus come to an end, and that the court's jurisdiction over it was thereby lost,

the court, upon application of plaintiffs in this action (substituted defendants in the other action), vacated the judgment of dismissal, and consolidated the two actions for trial. Upon the trial plaintiffs offered the depositions of Rigby and one Ehrman, taken in the Rigby action, and objection was made to their reception in evidence. The court excluded them, and properly. The Rigby action was at an end, the order of consolidation was without force and effect, and, except upon the theory that the Rigby action was an existing action consolidated with the present action, the depositions had no place in evidence; this, if for no other, yet for the sufficient, reasons that neither the parties to, nor the issues in, the two actions were identical, nor yet did the defendants Rossi in the present action have any opportunity to cross-examine the witnesses whose evidence was thus sought to be employed against them. We have preferred to discuss the questions presented upon this appeal without regard to the preliminary objection made by respondents to the consideration of the evidence upon the ground of the insufficiency of the specifications of error; but for the reasons given the judgment and order are affirmed.

We concur: Temple, J.; McFarland, J.

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## JOHNSON et al. v. GOODYEAR MIN. CO.

Sac. No. 668; May 20, 1899.

57 Pac. 383.

**Appeal—Failure to File Transcript.**—An appeal will be dismissed for failure to file the transcript within the time limited by the rules of court.

APPEAL from Superior Court, Sierra County.

Action by one Johnson and others against the Goodyear Mining Company. There was a judgment for plaintiffs and defendant appeals. Dismissed.

Frank R. Wehe for appellant; Frank D. Soward for respondents.

PER CURIAM.—Judgment in the above-entitled cause was entered in the superior court July 20, 1898, in favor of the plaintiffs and against the defendant. The appeal herein from said judgment was taken and perfected August 17, 1898. No transcript upon said appeal has been filed in this court, and the clerk of the superior court has certified that the appellant has not requested him to certify to any copy of the record in the case. The respondents now move to dismiss the appeal, under the provisions of rule 2 of this court, for failure to file the transcript within the time therein limited.

The motion is granted and the appeal dismissed.

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## STOCKTON ICE CO. v. ARGONAUT LAND AND DEVELOPMENT COMPANY.

Sac. No. 462; March 31, 1899.

56 Pac. 885.

**Agency—Revocation.—Liabilities Incurred by an Agent on behalf of his principal after the termination of the agency, in favor of one having no notice of the revocation of the agency, are binding on the principal, though he never ratified the agent's act.**

**Appeal.—Findings on Conflicting Evidence will not be disturbed, though the appellate court differs with the trial court as to the weight of the evidence.**[1]

APPEAL from Superior Court, San Joaquin County.

Action by the Stockton Ice Company against the Argonaut Land and Development Company. From a judgment for plaintiff and from an order denying a new trial defendant appeals. Affirmed.

James A. Louttit for appellant; Dudley & Buck for respondent.

HAYNES, C.—Both parties are corporations. The action is for coal sold and delivered to appellant, and for freight

[1] Cited with other cases in Sewell v. Hatcher, 6 Ariz. 322, 57 Pac. 610, as showing that the tendency of appellate courts still is to honor verdicts and findings on conflicting evidence.

paid and advanced by plaintiff for the defendant, all at its request. The plaintiff had judgment, and defendant appeals therefrom, and also from an order denying a new trial. No question is made but that the findings are sufficient to support the judgment, but it is contended that the evidence does not justify the findings, and this is the only question presented.

The principal controversy was as to the authority of Mr. Fairbrother to incur the indebtedness for the defendant corporation. It appears from the evidence that, prior to the transactions here in question, Fairbrother had been the duly authorized agent of the defendant, and at various times purchased coal, as such agent, from the plaintiff, to an amount exceeding $1,700, for all of which the defendant paid. It is claimed by the defendant, however, that his agency had ceased before the transactions here in question took place. To this contention the plaintiff replied that, whether his authority had in fact ceased or not, he continued to act as such agent as before, and that plaintiff had no notice of the revocation of the agency. If this be true, it is immaterial whether the defendant did or did not subsequently ratify Fairbrother's acts in incurring these liabilities. All the liabilities sued upon were such as the corporation defendant could properly incur, and hence the only question was whether Fairbrother was the agent, actual or ostensible, of the defendant. The evidence was conflicting, but quite sufficient to justify the findings. The facts were for the trial court to determine, and, even if we differed with that court as to the weight of the evidence, we could not disturb its action. The judgment and order appealed from should be affirmed.

We concur: Chipman, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

## STOCKTON SCHOOL DISTRICT v. GOODELL.

Sac. No. 662; April 5, 1899.

56 Pac. 885.

**Appeal.—An Appeal Bond must Conform to the Notice of appeal.**[1]

APPEAL from Superior Court, San Joaquin County.

Action by the Stockton School District against one Goodell. From the judgment an appeal was taken. Dismissed.

J. G. Swinnerton and Ed. R. Thompson for plaintiff; O. B. Parkinson, Carpenter & Slack and A. H. Carpenter for defendant.

PER CURIAM.—The undertaking on appeal in this case does not conform to the notice of appeal. The appeal is from the whole judgment for plaintiff in a mandamus proceeding. The undertaking recited an appeal from a judgment for $10 costs. Appeal dismissed.

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## JONES v. McGARVEY et al.

S. F. No. 1466; April 5, 1899.

56 Pac. 896.

**Appeal—Service of Notice on Attorney.**—Under Code of Civil Procedure, section 940, requiring notice of appeal to be served on the adverse party or his attorney, and section 1015, requiring the service of papers on the attorney, instead of the party, where he appears by attorney, notice of appeal must be served on appellee's attorney, if he have one.

APPEAL from Superior Court, Mendocino County.

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[1] Cited and approved in Walker v. McGinnis, 9 Idaho, 164, 72 Pac. 885. In the latter case, however, the cause being up for the second time, and the only question being the sufficiency of a modified judgment, the court proceeded notwithstanding the objection.

Action by one Jones against McGarvey and others. There was a judgment for defendants and plaintiff appeals. Dismissed.

David Jones for appellant; Chas. E. Wilson and J. A. Cooper for respondents.

PER CURIAM.—Plaintiff served his notice of appeal upon one of several codefendants, all of whom had appeared by an attorney. Construing sections 940 and 1015 of the Code of Civil Procedure together, they require service of notice of appeal to be made upon the attorney of a party who has appeared by attorney. In such case service upon the party personally is not authorized. Appeal dismissed.

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## SAN FRANCISCO SAVINGS UNION v. LONG.*

S. F. No. 1041; April 5, 1899.

56 Pac. 882.

**Appeal.—A Remittitur will not be Recalled where it conforms to the judgment as rendered, and it is too late to amend the judgment.**

PER CURIAM.—The motion to recall remittitur heretofore issued in this case is denied. It conforms to the judgment as rendered, and it is now too late to amend the judgment. The motion to amend our record nunc pro tunc, so as to show that the order made on the first day of November, 1898, was an order directing the amendment of the record by supplying the deficiency specified in the plaintiff's suggestion of diminution, is granted.

*For opinion in department, see ante, p. 60, 53 Pac. 907, and for opinion in bank, see 123 Cal. 107, 55 Pac. 708.

## ASHTON et al. v. HEYDENFELDT et al.*

S. F. No. 1266; April 10, 1899.

56 Pac. 1031.

**Appeal—Amendment of Judgment.—The Supreme Court will not amend its judgment directing a demurrer to the complaint to be overruled, by adding thereto a direction that respondents be allowed to answer, as application for leave to answer can be made to the trial court.**

Motion to amend the judgment of the supreme court. Motion denied.

PER CURIAM.—Respondents move to amend the judgment rendered, which directs that the demurrer to the complaint be overruled, by adding thereto a direction that respondents be allowed to answer; but this direction is not necessary, because the court below, if a proper showing be made, will undoubtedly allow the respondents to answer.

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## MEHERIN v. SAUNDERS, Constable, et al.

S. F. No. 1073; April 13, 1899.

56 Pac. 1110.

**Insolvency—Enforcement of Bid—Setoff.—In an Action by an assignee in insolvency to enforce the payment of an amount bid for property of the insolvent at a constable's sale defendant may set off his claim for money borrowed from him by the insolvent, which had been filed and proved against the insolvent's estate.**

**Insolvency—Action to Enforce Bid—Setoff—Estoppel.—The fact that a creditor of an insolvent had filed and proved his claim against the estate, and accepted a dividend based on the entire amount, does not estop him from setting off such claim, in an action by the assignee to enforce payment of a bid for property of the insolvent sold at constable's sale.**

APPEAL from Superior Court, City and County of San Francisco.

*For former opinion, see 124 Cal. 14, 56 Pac. 624.

Action by Mark Meherin, assignee in insolvency of the California Steamship Company, against J. N. Saunders, constable, and another. Judgment for plaintiff and defendant Thomas Ambrose appeals. Reversed.

A. Morganthal for appellant; Grant Jackson and Mullany, Grant & Cushing for respondent.

GAROUTTE, J.—Defendant Ambrose bid $10,000 for a piece of realty at an execution sale held by a constable. He paid the constable $855 in money, and gave his check for the balance of the purchase price. The money paid covered the judgment and costs, and the execution was returned satisfied. Thereafter payment of the check was stopped by Ambrose, and no more money was ever received under the sale. Upon this state of facts the judgment debtor's assignee in insolvency, the plaintiff herein, brought an action against the constable and his bondsmen, and recovered damages to the amount of the balance of the purchase price against the constable, and to the amount of $1,000 against his bondsmen. Upon appeal that judgment was affirmed by this court: Meherin v. Saunders, 110 Cal. 463, 42 Pac. 966. Subsequent to the foregoing proceedings the assignee in insolvency brought this action against the constable and the defendant Ambrose, purchaser at the sale, for the balance of the purchase price. The constable defaulted, and Ambrose now appeals from the judgment rendered against him, and also from the order denying his motion for a new trial.

There are a great number of interesting questions raised by the appeal in this case; but we refrain from discussing them, in view of another proposition urged, the disposition of which seems to finally end this litigation. By the answer of defendant Ambrose, he alleged that the insolvent debtor, represented by the plaintiff in this action, was, at the time of the constable's sale, and also at the time this action was brought, indebted to him in the sum of $80,000, and the evidence at the trial admits the existence of a large indebtedness. In substance, the trial court found that plaintiff's insolvent was indebted to defendant at the time of the constable's sale, to wit, October 24, 1891, in the sum of $28,604, and that upon January 5, 1892, defendant proved, presented and filed his verified claim as a creditor of the insolvent's estate for said

indebtedness. The court also found that subsequently defendant claimed and received a dividend based upon the amount of such indebtedness from the plaintiff as assignee in insolvency of the judgment debtor. The court then made the following finding: "That the said sum for and on which the said California Steamship Company was on the said twenty-fourth day of October, 1891, indebted to the defendant Thomas Ambrose, and the said balance of said purchase price of and for said real property, so bid in and purchased by said defendant Thomas Ambrose at said constable's sale, on said twenty-fourth day of October, 1891, was not and are not mutual debts and credits or mutual debts or credits, and defendant Thomas Ambrose did not become, or intend to become, a debtor of said California Steamship Company by reason of such purchase by him of said property, or for any part of the purchase price at which he purchased the same; that the said defendant Thomas Ambrose, when he presented, proved and filed his said claim against said insolvent corporation, said California Steamship Company, on or about the sixth day of January, 1892, did not claim that the balance of his said bill, to wit, said sum of $9,145, for and on account of which this action was brought, or any part thereof, was a credit upon the said sum of $28,604.47, so owing by said California Steamship Company to him, and he did not allow or give or permit any credit for said purchase price so bid by him for said property, or for any part thereof." As to that portion of this finding bearing upon defendant's intention to become a debtor of the judgment debtor, we do not see its materiality. We are unable to see how it affects this case, even if it be conceded that Ambrose did not intend to become a debtor of the judgment debtor when he made the purchase at the constable's sale. Again, it is difficult to see how any assistance to support the judgment in this case is given by a finding which declares as a fact that Ambrose did not become, nor intend to become, the debtor of the judgment debtor when he made the purchase. If he did not become a debtor of the plaintiff's insolvent by his failure to pay the purchase price, we are at a loss to see how the plaintiff can support the action.

By the findings quoted, the court declares that these cross-demands are not mutual debts and credits or mutual debts or credits. As to the nature of the plaintiff's cause of action,

his counsel stated, during the progress of the trial, to the following effect: Counsel for plaintiff: "You are mistaken in that. We do not claim it is a debt. It is money that he owes, in the sense of having purchased property, and owes the purchase price. We have to allege that money is owing from him, but it is not in the sense of a debt. He got something for a given sum of money. He did not pay that money. That is no debt. There was no credit given." Counsel for Ambrose: "You admit, then, that Ambrose does not owe anything to the California Steamship Company?" Counsel for plaintiff: "He owes us the purchase price for certain land." We are at a loss to understand the fine distinction here attempted to be drawn by plaintiff's counsel as between a debt and an amount due from defendant as the balance of the purchase price of a tract of land; yet there is nothing in a name, and, whatever name may be given to this claim by plaintiff, upon his own statement his action is one arising upon contract, and we see no reason in law why defendant's claim, which, as disclosed by the evidence, was for borrowed money, could not be offset against it. In his brief plaintiff's counsel says but little upon this question, but intimates that defendant is estopped by his conduct to rely upon a counterclaim. We see nothing in defendant's conduct in any way creating an estoppel against him. The fact that he proved his claim against the insolvent's estate for the entire indebtedness, and that he accepted a dividend based upon the entire amount of that indebtedness, does not create an estoppel. Indeed, appellant by his answer denied that he owed this money, denied that he even purchased the property, and denied that he agreed to pay $10,000 for it. But the court decided against him, and it knew best. He was mistaken as to the fact in this regard, and that fact being established contrary to his views, he then had the right to defend himself behind his second line of intrenchments, and claim an offset against the balance of the purchase price. By his answer and his evidence, he had the right, under the law, to defend himself behind as many different lines of intrenchments as he saw fit. As to the legal status of a case in which the constable was suing this defendant for a balance of the purchase price, we are not concerned. Here the plaintiff stands in the shoes of the judgment debtor. His position is no better and no worse. And as to the judgment debtor seeking to recover $9,000 as

balance due from defendant upon the purchase price of a tract of land, when at the same time that debtor owes the defendant $28,000 for borrowed money, the law will not sanction such a result. The findings are not sufficiently full to justify an order that judgment be entered for defendant in the trial court, but for the foregoing reasons the judgment and order are reversed and the cause remanded.

We concur: Harrison, J.; Van Dyke, J.

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## FAIR v. ANGUS et al.

S. F. Nos. 1155, 1156; May 23, 1899.

57 Pac. 385.

**Appeal—Setting Aside Submission.—Where a Justice has not Heard** the argument, and it is deemed important that all the justices should participate in the decision, the submission of the appeal will be set aside, with leave to counsel to stipulate to resubmit the case on the briefs and printed arguments already on file.

APPEAL from Superior Court, City and County of San Francisco.

Action by Charles L. Fair against James S. Angus and others. From a judgment for plaintiff, defendants appeal. Submission set aside, and resubmission ordered.

G. W. McEnerney for appellant Goodfellow; Van R. Paterson for appellants Guardian and others; Lloyd & Wood for appellants Theresa Oelrichs and Virginia Fair; Knight & Heggarty for respondent.

PER CURIAM.—In the above-entitled appeals, one of the justices of this court not having heard the arguments, and therefore being disqualified to participate in the decisions thereof, and it being deemed important that all of the justices should so participate, it is ordered that the submission of said appeals be set aside, and that they be resubmitted to the full court. As the briefs on these appeals are very elaborate, and as several of the oral arguments made at the hearing have been printed and are on file, counsel for the several

parties may stipulate, if they so desire, to immediately resubmit the cases on the briefs and printed arguments now on file; otherwise, they will be placed for argument on the next July calendar.

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## LOTHROP v. GOLDEN et al.

Sac. No. 386; May 25, 1899.

57 Pac. 394.

**Pleading—Ambiguity.—A Judgment will not be Reversed** for alleged ambiguity in the complaint where it appears from defendant's answer that he was not thereby misled to his prejudice.

**Parties—Misjoinder.—Where a Complaint Does not Show** that a party is improperly joined as a defendant, his remedy is by answer, and not by a demurrer for misjoinder of parties.

**Trover—Misjoinder of Actions.—Where, in an Action for Conversion, Plaintiff** claims damages for malicious acts of defendants in tearing down fences and buildings where the property was situated, there is not a misjoinder of causes of action; complainant's intention being to bring the case within Civil Code, section 3294, allowing exemplary damages where defendant has been guilty of oppression and malice.

**Trover—Damages.—In an Action for the Conversion of Grain,** there was evidence that it was forcibly taken in the absence of the owner, and over the protest of his wife; that defendants were twice arrested to prevent their taking it, but they obtained their release and returned to the premises. Held, that a verdict allowing plaintiff damages for grain taken, for time and money expended in pursuit thereof, and for the malicious taking, was proper, there being sufficient evidence as to the amounts of such damages given.

**Trover—Instructions.—In an Action for Conversion,** it is not error to deny defendant an instruction as to the doctrine of commingling of goods, where there was no evidence thereof.

**Trover—Instructions.—In an Action for the Conversion of Grain,** a part of which plaintiff alleged to have been recovered, and as to which he sought relief only for money expended in pursuit, an instruction that the jury, in estimating the damages, should find the value of the grain at the time of the taking, is not erroneous, as misleading them into believing that damages for the value of the grain returned could be recovered.

**Trover—Exemplary Damages.—In an Action for Conversion, an erroneous instruction** authorizing the jury to award exemplary dam-

ages if the taking was unlawful is not reversible error where the jury specially found damages for the malicious taking of the property.

**Trover—Joinder of Actions.—Plaintiff in an Action** for the conversion of grain alleged that a part had been returned prior to the suit, but sought, under Civil Code, section 3336, to recover compensation for the time and money expended in its pursuit. Held, that the actions were not improperly joined, since all the grain converted was taken at the same time, and the acts complained of constituted one and the same wrong.

**Trover—Instructions.—Error, in an Action for Conversion,** where plaintiff claimed damages for malicious acts of defendant in tearing down his fences to obtain access to the property, in an instruction that if defendants did such acts they were trespassers, and were liable therefor to plaintiff, is harmless, where the special verdict awarded no damages for trespass.

APPEAL from Superior Court, Glenn County.

Action for conversion by M. H. Lothrop against M. Golden and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Ben. F. Geis and H. M. Alberry for appellants; Chas. L. Donohoe for respondent.

CHIPMAN, C.—Action for the conversion of certain 585 sacks of barley, and for damages. A fourth amended complaint alleges the malicious, forcible and unlawful taking from plaintiff by defendants, and the conversion of certain 1,388 sacks of whole barley about July 26, 1894, of which plaintiff recovered 803 sacks before this action was commenced. Damage is claimed of $600 and interest for the value of 585 sacks of barley not recovered, "and one hundred dollars damages by reason of the malicious, forcible, oppressive, and unlawful acts of defendants towards plaintiff." It is alleged that "plaintiff has been damaged in time and money properly expended in the pursuit of said eight hundred and three sacks of barley, in the sum of two hundred dollars." It is also alleged that plaintiff has been damaged, in time and money properly expended in the pursuit of said 585 sacks of barley, in the sum of $100. The prayer is for judgment against defendants for the sum of $1,000, and for costs of suit. The complaint is verified. Defendants demurred on several grounds: (1) Insufficiency of facts;

(2) several causes of action improperly united; (3) uncertainty and ambiguity; (4) misjoinder of parties defendant. The demurrer was overruled, and defendants answered, specifically denying the material allegations of the complaint. For further answer it is alleged that the barley, the subject of the action, was grown upon land belonging to and cultivated by one T. J. Kirkpatrick, who had theretofore mortgaged the crops grown and to be grown thereon to defendants, other than O'Brien, to secure the payment of the sum of $1,182.68 owing to defendants Hochheimer & Co. by said Kirkpatrick; that the barley in question was grown upon these mortgaged premises, and was a part of the crop subject to said mortgage, and that said mortgagees were entitled to the possession thereof; that defendant O'Brien was in the employ of and acting for said Hochheimer & Co., and under their direction, during all the times mentioned in the complaint. It is further alleged in the answer that plaintiff claims the barley in question under a pretended purchase from said Kirkpatrick after the execution of said mortgage, and that said sale or transfer was not accompanied by an immediate delivery of the barley, nor followed by an actual and continued change of possession thereof; that no consideration was paid therefor, and said sale was made to defraud the creditors of said Kirkpatrick, and especially defendants, and was fraudulent and void. The cause was tried by a jury, and plaintiff had a verdict for $91.33 "for the value and the interest on the value of ninety-seven sacks of barley," and $163.37 "as money and compensation for time expended in the pursuit of the eight hundred and three sacks of barley," and $34.20 "for money and time properly expended in the pursuit of ninety-seven, number of sacks of barley not returned to plaintiff," and $33.75 "for the malicious taking of the barley." Judgment was accordingly entered for $322.65, the amount of said verdict. The appeal is from the judgment, and from an order denying defendants' motion for a new trial.

1. The complaint is sufficient upon general demurrer. As to the alleged ambiguity and uncertainty, the rule as laid down by this court in numerous cases was stated in the recent case of Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. 468, and need not be repeated here. An examination of defendants' answer, not to mention the evidence at the trial, clearly shows that defendants were not misled

to their prejudice by the alleged ambiguity or uncertainty in the complaint, in which case the judgment will not be reversed. If O'Brien was not a party to the alleged unlawful taking and conversion of the property, his remedy was by answer, and not by demurrer for misjoinder of parties. Nothing in the complaint shows that he was improperly joined as defendant. Plaintiff had the right to join all who participated in the alleged taking and conversion. Nor do we think that the complaint necessarily discloses a misjoinder of causes of action. The claim of misjoinder is based upon the following allegations: "And by reason of the malicious, forcible, oppressive and unlawful acts of defendants toward plaintiff, plaintiff has been damaged in the sum of one hundred dollars," and allegations charging defendants with "tearing down fences and buildings where the barley was situated," and having "maliciously, forcibly, and unlawfully entered upon the premises of plaintiff." These allegations all point to the gravamen of the complaint, which was that defendants "took and carried away said thirteen hundred and eighty-eight sacks of whole barley, and converted and disposed of the same to their own use and benefit." The evident purpose of the pleader was to bring the case within section 3294 of the Civil Code, which allows exemplary damages "where the defendant has been guilty of oppression, fraud or malice, actual or presumed," etc. There may be some ambiguity and uncertainty in the pleading as to whether the malice and force alleged related exclusively to the manner of taking the barley, but we have seen that defendants were not for this reason misled to their prejudice.

2. It is claimed that the evidence does not sustain the verdict. To determine the question we cannot look where the preponderance of the evidence lies, nor can we accept or reject the evidence of this or that witness, as the jury had the right to do. We can only search to find sufficient evidence to support the verdict upon the questions of fact submitted to the jury. It appears that on August 26, 1893, said T. J. Kirkpatrick was farming sections 1, 2, 11, 12 and 24, township 22 N., range 4 W., in Glenn county. Being indebted to defendants Hochheimer & Co. in the sum of $1,182.68, he gave them a crop mortgage on the crops growing and to be grown on sections 11 and 24 for the crop season of 1893 and 1894. The barley in question was harvested in

July, 1894. Plaintiff testified that about July 4, 1894, he entered upon negotiations with Kirkpatrick, who was his father in law, for the lease of the land being farmed by the latter; and plaintiff began moving his furniture to the place, and his family occupied the premises on the 9th. His father in law and family still occupied the house with plaintiff, and continued to do so. He testified further that the bargain for the lease was made early in July, but was not put in writing until July 24th. He had been in possession before that date, but took possession under the written lease July 24th. The lease does not appear in evidence. On that date Kirkpatrick made a written bill of sale to plaintiff of some farming implements, 900 sacks of barley, and 60 tons of hay in barn, "all situated on the ranch known as the 'Kirkpatrick Ranch,' near Orland, Glenn county" (the land above described). He gave two notes to Kirkpatrick—one for the lease and one for the personal property—and these notes, he testified, he afterward paid. It appears from the evidence of E. C. Kirkpatrick, son of T. J., that he (witness) hauled the barley in question from the field to the granaries on the ranch, whence it was taken by defendants; that he hauled 1,518 sacks to these bins, part of which was put in loose and part in sacks; that he assisted in hauling 130 or 140 sacks of this barley to Chico on July 23d. When this barley was taken out he "nailed the granaries up," and there remained in the bins all the barley, less 130 sacks. When he returned from Chico in the afternoon of the 24th, the barley was in the same condition as he left it. The dwelling and granaries were on section 12. He testified that sections 11 and 24 (the mortgaged land) produced 512 sacks, and the other sections 1,518 sacks; that he delivered all the barley grown on sections 11 and 24 to Hochheimer & Co., and there were but 512 sacks of it; that there was no barley hauled to the granaries from sections 11 and 24. The evidence tends to show that under the personal direction of defendant Golden, one of the members of Hochheimer & Co., defendants went with several large freighting teams to where this barley was stored, on July 25th, with the purpose of hauling it away, and while attempting to do so the wife of plaintiff—plaintiff being absent at Sacramento—told Golden the barley belonged to plaintiff, and forbade his taking it. Upon his persisting, which he did by causing the loose barley to be sacked and the wagons loaded,

plaintiff's wife secured warrants for the arrest of the entire party, and they were arrested. She had the barley put back in the granaries, and the teams taken out to the public road. The party, however, were all released, and returned to remove the barley, and were a second time arrested, and a second time returned, and this time hauled away the barley. The evidence tended to show that 803 sacks were delivered to Hochheimer & Co. at their Orland warehouse, and 271 sacks were delivered to them at Greenwood Switch, or at their Germantown warehouse, of all of which plaintiff succeeded in recovering 803 sacks, and no more. The jury gave a verdict for 97 sacks of barley, which, added to the 803 previously recovered, make 900 sacks, the number mentioned in the bill of sale. There was ample evidence to show at least this many sacks taken by defendants in addition to the 803 sacks. The jury found plaintiff entitled to $163.37 expended in the pursuit of the 803 sacks. Plaintiff testified upon this point that he paid out $15 for keeper's fees in Orland; $40 for the rent of a building to which he moved the barley, and $15 for cost of moving it; $50 to haul the barley back to the ranch; and for seven different trips to Willows and expenses, $30. He testified that he spent ten or fifteen days "in looking up this eight hundred and three sacks of barley," and he valued his time and expenses at $5 per day. The jury allowed $34.20 for time and money expended in the pursuit of the 585 sacks, for 97 sacks of which the jury gave a verdict. Plaintiff testified that he spent $20 in money and fifteen or twenty days' time in searching for the 585 sacks claimed, and that it was worth $1 a day for a man to take his place and drive a team. We cannot say that the jury were not justified in the conclusion they reached as to these items. The item $33.75 "for the malicious taking of the barley" finds sufficient support in the evidence, and is authorized under section 3294 of the Civil Code. The evidence shows that the barley was taken with considerable display of violence, in the absence of the one who claimed to own it, and against the protest of his wife; that the defendants were twice arrested to prevent their taking the barley, and as often obtained their release and returned to the premises of the plaintiff, and finally by force obtained access to the premises and granaries, and worked nearly the entire night of the 26th of July to accomplish their

purpose. It may be that defendants thought they had a right to the barley. But they do not justify under any legal process, and were not warranted by any claim of title through their crop mortgage in resorting to so extraordinary a course to obtain possession.

3. Defendants introduced evidence tending to show that sections 11 and 24 produced more barley than 512 sacks, as testified to by E. C. Kirkpatrick, and it is claimed that this evidence tended to show that some of the mortgaged crop was hauled to the granaries; and was mingled with plaintiff's barley, and hence was involved the rule as to mingled goods, as to which defendants asked several instructions, which were refused. There was no evidence which, as we view it, in any way tended to show that any of the mortgaged barley was removed to the granaries, and the direct evidence of Kirkpatrick was that none went there. As we regard defendants' evidence, it tended to contradict Kirkpatrick, who testified that all the mortgaged barley was delivered to defendants, but it did not tend to show that any of it was hauled to the granaries, and therefore it was not error to refuse instructions as to the doctrine relating to commingling goods. There was no evidence calling for instructions upon that subject.

4. The correctness of several instructions given by the court is challenged.

(a) The court instructed the jury as follows: "In estimating the damages sustained by the plaintiff, you will find the value of the property at the time of the conversion as shown by the evidence," etc. The objection is that, using the term "the property," the instruction included "property not sued for as well as property sued for." We suppose defendants refer to the 803 sacks of barley recovered before this suit was brought. The action was for the conversion of all the barley, a part of which had already been found and taken back. As to this latter the only relief sought was for money expended in this pursuit. The instruction could not have misled the jury into believing that a verdict for the value of any part of the 803 sacks could be recovered.

(b) The jury were instructed that if they should find from the evidence that the barley was taken from plaintiff by defendants, "and that such taking was malicious and unlawful and fraudulent, or was malicious or unlawful or fraudulent,

that you may find for the plaintiff damages . . . . by way of punishment to the defendants for their malicious and unlawful acts." The objection is that the jury were told they might award exemplary damages if they found the taking to have been unlawful. We think the instruction was erroneous: Yerian v. Linkletter, 80 Cal. 135, 22 Pac. 70. But the jury found specially that plaintiff was damaged "in the sum of thirty-three dollars and seventy-five cents for the malicious taking of the barley." It thus appears that the instruction, though erroneous, did not mislead the jury, and was without injury. There was evidence justifying the verdict that the taking was malicious.

(c) An instruction was given that plaintiff was entitled to recover for time and money expended in the pursuit of the 803 sacks of barley. The objection is that this barley had already been recovered, and plaintiff could not have damage in this action for its pursuit. Plaintiff claims under section 3336 of the Civil Code, which provides that "the detriment caused by the wrongful conversion of personal property is presumed to be: . . . . (2) A fair compensation for the time and money properly expended in pursuit of the property." The complaint shows that defendants originally took this 803 sacks with the other barley, and, although the complaint also shows that plaintiff recovered the 803 sacks before this suit was brought, it does allege "that plaintiff has been damaged in time and money properly expended in the pursuit of said eight hundred and three sacks of barley." We can perceive no good reason why plaintiff should be put to his separate action in order to recover this damage. If he had not succeeded in getting possession of this portion of the barley, and had included it in the complaint as converted, he clearly could have recovered the damage given by the statute. All the barley was taken at the same time, and the acts complained of constituted one and the same wrong. The damage to plaintiff in time and money expended in pursuit of the property grew out of this wrong. The law gave him his action to recover the property or its value, and also damage for money expended in its pursuit. The remedy to recover possession or the value did not become necessary as to the 803 sacks, but it did become necessary as to the time and money expended to get possession. For this the law affords a remedy, and we think, under the circumstances of this case, it

was proper in this action. The reasoning in Arzaga v. Villalba, 85 Cal. 191, 24 Pac. 656, we think supports this view.

(d) Instruction 7, in effect, declares that, if defendants did the acts complained of and mentioned in the instruction (coming upon the premises, and tearing down fences and tearing down the doors of the granaries), "then they and their agents were mere trespassers, and for such acts are liable to plaintiff in damages." This was erroneous, and, if there had been a general verdict, would call for a reversal of the judgment. But the verdict is special, and clearly shows that no damages were awarded for trespass, and hence defendants were not injured.

(e) Instruction 10 is that defendants admitted in their answer the taking of 1,388 sacks of barley from plaintiff, and instruction 11 is that the answer admitted taking 1,074 sacks of barley in question on July 26th, and that 803 sacks were recovered by plaintiff, and 271 were never returned, and that, if the jury find that plaintiff was the owner of the 271 sacks, they should find in favor of plaintiff for the value thereof. The answer admits the value of the barley to be $1,100, and that defendants took from plaintiff 1,074 sacks. By failure to deny, defendants admitted the return of 803 sacks, and that there were 271 sacks not returned. Conceding that it was not admitted that they took 1,388 sacks, and that the instruction was unwarranted, still the admission covers 174 sacks more than the jury found were not recovered, and defendants were not injured by the instruction.

Error is claimed as resulting from many other instructions given by the court, but it would greatly prolong this opinion to notice them in detail. It may be remarked that the jury, by its special verdict, cured many of the errors complained of, and others involve questions already noticed. We have discovered no error which could have resulted in injury to defendants. Discovering no reversible error, it is advised that the judgment and order be affirmed.

We concur: Gray, C., Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## YORE v. SEITZ et al.

Sac. No. 510; June 21, 1899.

57 Pac. 886.

**Appeal.—A Finding Supported by Evidence** will not be disturbed on appeal.

APPEAL from Superior Court, Sierra County.

Action by J. J. Yore against F. J. Seitz and F. J. Seitz, administrator of the estate of Anna Maria Seitz. There was judgment for plaintiff, and defendants appeal. Affirmed

F. D. Soward for appellants; Frank R. Wehe for respondent.

PER CURIAM.—This is an action to foreclose a pledge of 200,000 shares of the capital stock of the Butte Saddle Gold Mining Company, a corporation. By appellants it is contended that the stock was the separate property of Anna Maria Seitz, the wife of appellant F. J. Seitz; that certain payments or advances made by the pledgee were not within the terms of the pledge; and that as to them he does not hold the stock as security. The court, however, found that the pledged stock was community property. This finding is attacked, but it cannot be overthrown. There is evidence sufficient to support it. The questioned payments were made at the request of the husband, F. J. Seitz, and under his contract the stock was made security for them. The judgment and order appealed from are therefore affirmed.

## In re WALKER'S ESTATE.

S. F. No. 1326; June 28, 1899.

57 Pac. 993.

**Appeal.—The Striking Out of Evidence is Harmless where it would have authorized no other relief than that warranted by the evidence admitted.**

APPEAL from Superior Court, Sonoma County.

In the matter of the estate of John Walker, deceased. From an order settling the first annual account of J. M. Walker as administrator, he appeals. Affirmed.

J. M. Thompson for appellant; J. A. Leppo for respondent.

TEMPLE, J.—This is an appeal from an order settling the first annual account of the administrator. The appeal was submitted at the same time as the appeal from the order settling the final account, a case similarly entitled, and numbered S. F. No. 1327 (125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991). As will appear from the opinion rendered in that case, it is not necessary to reverse or modify the order entered to give the appellant all the protection he can properly obtain, and that he was not injured by the ruling striking out the evidence introduced by him. The order is affirmed.

We concur: McFarland, J.; Henshaw, J.

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## BRADBURY et al. v. McHENRY et al.

S. F. No. 803; July 1, 1899.

57 Pac. 999.

**Trial.—A Remark Made by the Court on Rejecting Evidence** offered by plaintiffs, that he could see the dilemma plaintiffs were in, and wished to give them all the latitude possible, but did not see the materiality of the testimony offered, was not reversible error, as in effect telling the jury that plaintiffs had no case.

**Well Contract.—On an Issue of Implied Contract of a Land Owner to pay for a well,** evidence of the capacity of the well, and of the

amount of stock on the place, and of the fact that crops were being raised where none were raised before, is immaterial.

**Well Contract.—Evidence That a Tenant Did not Think** he was liable to pay for the boring of a well on the premises is not admissible against the landlord to show that he was liable therefor.

**Well Contract.—In an Action Against a Husband** and wife to pay for boring a well on the wife's premises, which had been leased to a firm composed of the husband's brother and a third person, evidence as to whether the husband and his brother had ever been partners is immaterial.

APPEAL from Superior Court, City and County of San Francisco.

Action by Bradbury & Caylor against John McHenry and another. From a judgment for defendants and from an order denying a new trial plaintiffs appeal. Affirmed.

O'Brien, O'Brien & O'Brien for appellants; John Flouroy for respondents.

COOPER, C.—This action was brought by plaintiffs to recover of defendants the sum of $2,034.45, alleged to be due upon an express contract for services rendered and material furnished in boring for defendants an artesian well. The facts as to the boring of the well and the value of the services and material were not controverted. The premises on which the well was bored belonged at all the times referred to in the complaint to the defendant Nellie McHenry, who is the wife of defendant John McHenry, but were leased to, and in the possession of, one James McHenry and Phillip L. Wooster, partners under the name of Wooster & McHenry. James McHenry was a brother of defendant John McHenry. It was claimed by defendants that the well was bored at the request of, and under a contract with, the firm of Wooster & McHenry, and that defendants had nothing to do with the employment of plaintiffs in any manner. The question was as to whether plaintiffs' contract was with defendants, as contended by plaintiffs, or with the firm of Wooster & McHenry. It was established without contradiction that, prior to the commencement of the present suit, the plaintiffs commenced an action against the firm of Wooster & McHenry by filing a verified complaint, alleging that the amount now claimed was due from said firm of Wooster & McHenry upon

upon the property of defendants by their lessees, and the benefit it might be to the property, are not facts tending to show an implied contract. If the value of the well was a fact in issue, then its character and capacity might tend to throw light upon such issue; but it seems to us that if the court had allowed evidence as to the number of hogs upon the ranch, the capacity of the well, and the effect it had upon crops, it would not even tend to show an implied contract on the part of these defendants.

We do not think the questions asked by plaintiffs' counsel of the witness Wooster were material or in rebuttal. They were asked for the purpose of showing that the witness, while a partner of James McHenry, understood that his firm, Wooster & McHenry, was not responsible for the boring of the well. To prove that some other party was not responsible would not tend to show that defendants were responsible.

It is argued by plaintiffs that the court erred in sustaining defendants' objection to plaintiffs' question to the witness Wooster. The witness was asked if the McHenry brothers had ever been in partnership. The question was objected to upon the ground that it was immaterial and not in rebuttal. The question was subject to both objections. It was not in rebuttal, as no witness had testified either way as to any partnership between the McHenry brothers, and, if there had been such testimony, the fact is wholly immaterial. It would not tend to prove a contract on the part of these defendants to pay for the well, as alleged in the complaint. Many other similar errors in rulings are assigned, but none of them require special notice. They all depend upon the principles and rulings herein discussed, and we find no error in the record of sufficient importance to justify a reversal of the case. The judgment and order should be affirmed.

We concur: Britt, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## WILLIAMS et al. v. BERGIN et al.*

S. F. No. 1027; July 12, 1899.

57 Pac. 1072.

**Street Assessment—Appeal to Supervisors.**—Under Statutes of 1885, page 156, section 11, providing that an appeal from an assessment shall be taken to the board of supervisors "within thirty days after the day of the warrant," the petition on appeal must show that a warrant was in fact issued, and the order of the board of supervisors that a warrant be set aside is insufficient to supply the deficiency.

APPEAL from Superior Court, City and County of San Francisco.

Action by Leo C. Williams and others against Thomas I. Bergin and others. A demurrer to the complaint was sustained, and defendants appeal. Affirmed.

J. C. Bates for appellants; Thomas I. Bergin for respondents.

HENSHAW, J.—This is an action to foreclose the lien of a street assessment. Defendants interposed a demurrer, both general and special. The demurrer was sustained, and, plaintiffs declining to amend, judgment was entered against them. From this judgment they appeal.

The suit was upon a second assessment ordered by the board of supervisors after a successful appeal by the plaintiffs from the first assessment. The board of supervisors acts judicially in hearing and determining such an appeal. Its jurisdiction is limited, and the mode prescribed by the statute for acquiring jurisdiction must be strictly followed. Not only this, but, when reliance is had upon the judgment of such a tribunal as the foundation for an asserted right, it must be shown by proper averment that the tribunal had jurisdiction to render the judgment in question: Williams v. Bergin, 108 Cal. 169, 41 Pac. 287. By the statute the time of appeal is limited upon the date of the warrant. The party aggrieved shall appeal "within thirty days after the date of the warrant": Street Law (Stats. 1885, p. 156), sec. 11. We might be willing to hold that an appeal from an assessment taken before the

*For subsequent opinion in bank, see 127 Cal. 578, 60 Pac. 164.

date of the warrant would be within the requirements of this provision, construing it merely as fixing a time after which an appeal could not be taken. But, in any event, it must be made to appear that a warrant was in fact issued, and this the complaint under consideration fails to do. The averment is that the plaintiffs and contractors, "feeling aggrieved by an act and determination of the superintendent of streets in relation to an assessment made and issued by said superintendent of streets May 6, 1892, for the sums due for said work so contracted for and performed, . . . . appealed to the board of supervisors of the said city and county from said assessment; briefly stating in said notice their objections, in writing, . . . . and filing the same with the clerk of said board on the 14th day of May, 1892." Then follow averments of notice of the posting and of the hearing, and the resolution or order of the board of supervisors is set forth in extenso. By that order it was resolved "that the assessment, warrant, and diagram made and issued by the superintendent of streets . . . . be, and is hereby, set aside, and the superintendent of streets is hereby directed to make and issue a new assessment, warrant and diagram, correcting the error made in the former assessment hereby set aside." But this order of the board of supervisors that a warrant be set aside does not amount even to an argumentative or inferential declaration in the complaint that such a warrant was ever issued. As the law has seen fit to make the right of appeal and its time depend upon the date of the warrant, the supervisors would not acquire jurisdiction to hear an appeal taken in a case in which no warrant had in fact been issued. The judgment appealed from is therefore affirmed.

We concur: Temple, J.; McFarland, J.

# CALIFORNIA MORTGAGE & SAVINGS BANK v. HAMPTON.

L. A. No. 567; July 11, 1899.

57 Pac. 1073.

**Deeds—Construction by Acts of Parties.—Defendant Conveyed Part** of a tract of land, and a fence was constructed by him and a subsequent grantee so as to include the land described in the conveyance and an additional piece belonging to him, and the land was subsequently conveyed to plaintiff by a description following the line of the fence. Defendant claimed that after the fence was constructed he discovered that it included too much land, and so notified the owner, but took no steps to have it moved, and allowed it to remain for twenty years, and in conveying an adjoining piece had it surveyed, and used a description corresponding to the line of the fence. Held, in an action to quiet title to the additional piece on the ground that it should have been included in the original conveyance by defendant, that the subsequent acts of the parties had established plaintiff's title.

**Quieting Title—Judgment.—Where, for Twenty-three Years Previous** to an action to quiet title, defendant had maintained a dam across a stream at a point where it intersected the line between his land and the land in controversy, thereby backing the water over a part of the land involved so as to divert it into his ditch, and in the action, while alleging title to the land, he fails to allege a right to flow it, merely alleging riparian rights in the stream, he cannot complain that the judgment declaring that he had no interest in the land, but allowing him to maintain the dam, does not also give him the right to divert the water, and flow plaintiff's land.

APPEAL from Superior Court, San Luis Obispo County.

Action by California Mortgage and Savings Bank against George W. Hampton and Julia H. Hampton. Judgment for plaintiff and defendants appeal. Affirmed.

W. H. Spencer for appellants; Venable & Goodchild for respondent.

CHIPMAN, C.—Action to quiet title. Plaintiff had judgment, from which, and from an order denying motion for a new trial, defendants appeal.

It appears that in 1876 defendants were the owners of the south one-half of the southeast one-quarter of section 22, township 30 south, range 12 east, situated in San Luis Obispo

county. They in that year conveyed to one Andrews, by metes and bounds, a portion of said land by the description given in the answer, to which defendants disclaim ownership. In 1877 Andrews conveyed this piece of land by the same description to one Breed and he, in 1887, conveyed the land by the same description to one Dutton, and he, in 1897, by the same description, conveyed it to plaintiff, and ten days thereafter conveyed by quitclaim to plaintiff by the description given in the complaint. This latter description coincides exactly with the tract as it was fenced by Breed, a part of which fence was built by defendants, and which remains to-day the same as when built in 1877. The fenced tract is known as the "Dutton Place." A map attached to the original transcript shows this description by a black line, which follows around the tract as the fence is built; and by a dotted line the land described in the answer is shown when run according to the courses and distances, but disregarding the calls or stations. The map also shows a piece of land formerly owned by defendants, part of the original tract, lying east of the Dutton place, which defendants conveyed to one Preston in 1894. This deed is in evidence, and its calls, so far as they describe the line dividing the Dutton place from defendants' land sold to Preston, coincide with the line of fence built in 1877, and it is in evidence that Hampton assisted in making this Preston survey; and the surveyor, Story, testified that he had no recollection that Hampton told him that he owned any land within the Dutton fence. Dutton testified that he had been in possession of the tract as fenced since 1882 and bought it in 1887, and that no one but himself ever claimed to own it since that time; and he did not admit ownership in anybody else at any time. Hampton testified that he told Breed that he (Breed) had some of his (Hampton's) land inclosed, and he also testified that he so told Dutton, but this latter statement is disputed by Dutton. Hampton also testified that the fence is now where it was built originally in 1887; that he built about twelve or thirteen chains of the line, commencing on the south side of his land, and Breed built the balance, and that the fence inclosed about three-quarters of an acre too much, because Breed commenced building the line on the second course two chains farther south than it should be; that he found this out by measuring the first line with a tape soon after the fence was built, and that he told Breed of it at the

time. It seems, however, that he took no steps to have the fence moved, and allowed it to remain for twenty years, and until after Dutton bought; and when he sold the piece of land contiguous to the Dutton place on the east he had it surveyed, and the description which he caused to be put in the deed to Preston corresponded with the line of fence, and was a recognition of the correctness of its location. The real controversy centers upon the question whether the first call in the Andrews deed for a line, "north 18.20 chains to post 2," was wrong, and should have been 16.25 chains, as the fence gives it. Aside from the conduct of the parties interested in recognizing the line to be 16.25 chains, as the fence shows it should be, the third call of the Andrews deed, which is 4 chains running north, added to the 16.25 chains, makes 20.25 chains, which nearly corresponds with the actual width (20 chains) of Hampton's entire tract. But if we add 4 chains to 18.20, as the Andrews deed called for in the first line, we have 22.20 chains, or 2 chains north of Hampton's north line. It is, of course, possible that the third line was too long and the first line right; and the second call, which runs to the creek, points that way. It seems, however, that all the calls are to posts, and these monuments would govern, if ascertained, rather than the distance or length given for the line; and, as the fence was built shortly after the Andrews deed was made, it is altogether probable that the fence was built to these established posts as corners and known monuments. At any rate, the subsequent conduct of the parties, we think, should be taken to remove any doubt there may be as to the real fact. It may be added that counsel for respondent state—what is not disputed—that a computation of the acreage according to the fence boundaries makes within the fraction of one one-hundredth of an acre of the acreage called for in the Andrews deed (25.70), while, if the first line in the Andrews deed is taken as correct, and the third as 2 chains too long, the acreage would be 25.01, or about seventy one-hundredths of an acre less than the deed calls for.

2. The court found that "defendants have no interest in said parcel of land . . . . except only that they have the right to maintain a dam across the Stenner creek where the same intersects the east line of said parcel of land in such manner that the west end of said dam may be (as at present) within said parcel of land." The only evidence as to any claim to

the water of this creek was given by Mr. Hampton, upon cross-examination, when called as a witness for plaintiff. He testified: "There is about three-quarters of an acre of land in dispute here, caused by Breed's fence, on the second line from the starting point according to Story's map, being two chains farther south than it should be. My water dam backs the water over about one-eighth of this three-quarters of an acre to get it in my ditch, and has done so every year for the past twenty-three years. No one has ever objected to my use of the water until this suit was commenced." The judgment reads: "And the defendants are hereby perpetually debarred from asserting any claim whatever in or to said land, or in or to the waters flowing in Stenner creek on said land, adverse to plaintiff, with the proviso that defendants have the right to maintain a dam across Stenner creek where the same intersects the east line of said parcel of land in such manner that the west end of said dam may be (as at present) within said parcel of land." Appellants complain that this is giving a stone where bread was asked, for the right to erect the dam is of no value if there be no right given to divert the water of the creek thereby as they had been doing for twenty-three years. Plaintiff claimed the right, as riparian owner, to the water of this creek flowing through its land. Defendants, in their answer, claimed an interest in the water as riparian owners only. Defendants could not have any greater relief than they claimed, and they made no claim as appropriators; indeed, the answer prays for no relief whatever. The evidence is certainly very meager as to defendants' right to the water, and there is none at all as to plaintiff's. As owners of the soil, both plaintiff and defendants were riparian proprietors. The judgment is that defendants shall assert no claim "to the waters flowing in Stenner creek on said land (i. e., plaintiff's land) adverse to plaintiff." We do not understand this to interfere with defendants' rights as riparian proprietors. They have the right adjudged in their favor to erect the dam as heretofore, which seems to be all and more than they asked. If they had desired the further right to flow the lands of plaintiff—to have an easement to back the water over plaintiff's land—they should have so alleged in their answer in some appropriate manner. We cannot see that the judgment restrains defendants from using water on their own land as

riparian proprietors. It is advised that the judgment and order be affirmed.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## PEOPLE v. SOLOMON.

Cr. No. 501; July 18, 1899.

59 Pac. 55.

**Receiving Stolen Goods—Corroboration of Accomplice.**—Under Penal Code, section 1111, requiring corroboration of the testimony of an accomplice, evidence in a prosecution for receiving stolen goods that defendant placed the goods in the back room of a saloon, saying that he had loaned money on them, and offering no explanation why they were put there, is sufficient to corroborate the testimony of the accomplice.

**Accomplice—Sufficiency of Corroboration.**—Under Penal Code, section 1111, requiring corroboration of the testimony of an accomplice, it is not necessary that corroborative evidence should go so far as to establish by itself, and without the aid of the testimony of the accomplice, that defendant in a prosecution for receiving stolen goods possessed the requisite guilty knowledge.[1]

**Criminal Trial—Instructions.**—It is not Error for the Court to Refuse to give an instruction, the substance of which he has given in a preceding one.

**Receiving Stolen Goods.**—In a Prosecution for Receiving Stolen Goods it is not error for the court to refuse to instruct that the fact that defendant did not attempt to prevent the owner from recovering his goods is evidence that he did not know that they were stolen.

APPEAL from Superior Court, Los Angeles County.

B. Solomon was convicted of receiving stolen goods, and appeals. Affirmed.

J. J. Fitzgerald for appellant; Attorney General Ford for the people.

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[1] Cited in the note in 98 Am. St. Rep. 174, on convictions on the testimony of an accomplice.

GRAY, C.—The defendant appeals from an order denying a new trial, and from a judgment convicting him of the crime of buying and receiving stolen goods, as defined in section 496 of the Penal Code.

It is objected, first, that the evidence is insufficient to convict, for the reason that there is no corroboration of the testimony of the thief and accomplice, W. H. Eldred, of whom defendant received the stolen goods. It appears by evidence, independent of the testimony of Eldred, that the defendant was in possession of the stolen clothes which he is charged with receiving soon after they were stolen, and deposited them in the back room of a saloon, telling the bar-keeper that he had loaned $2.50 on them; that he would take them out the next morning, and that if an old soldier called, and paid $2.50, to let him have them; that defendant was a dealer in second-hand clothes, and his place of business was right beside this saloon; that he did not call for the clothes as he said he would, but let them remain in the back room of the saloon until discovered by an officer, four or five days after they were stolen; that defendant sold a pair of pants, part of this clothing, for $1, before his arrest; that the goods were worth $7.50; that he told the officer that he got the clothes from an old soldier, and had loaned him $2.50 on them, and he (the old soldier) was going to get him some more goods, or take the goods away. The goods, when found by the officer, were done up in a piece of bed ticking, tied up like a roll of blankets. No explanation is attempted as to the conduct of defendant in depositing the clothes in the back room of the saloon, instead of keeping them in his place of business. The stolen shears were found in defendant's shop. We think the foregoing facts tended to show guilty knowledge on the part of defendant, and thus tended to connect the defendant with the commission of the offense with which he was charged, and that the testimony of the accomplice was corroborated, as required by section 1111 of the Penal Code.

Instruction 1 asked by the defendant was properly refused by the court. It is not necessary that the corroborating evidence should "go so far as to establish by itself, and without the aid of the testimony of the accomplice, that the defendant knew at the time of the receipt by him of the goods described that they were stolen." In instruction 5 given at the request of defendant the court clearly and fully defined the rule as to

the corroboration of the testimony of an accomplice as it applied to the case before the jury, and it was not necessary to repeat this instruction. For this reason the court was warranted in refusing instruction 3 asked by defendant. The seventh instruction requested by the defendant was properly refused. That the defendant "did not attempt to prevent the owner of said goods from again possessing his property" cannot be urged as evidence that he received the goods without knowledge of their having been stolen. We advise that the judgment and order appealed from be affirmed.

We concur: Chipman, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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## ASHTON v. GOLDEN GATE LUMBER CO.

S. F. No. 954; July 19, 1899.

58 Pac. 1.

**Tenant—Estoppel to Deny Landlord's Title.**—Where plaintiff had such title under a deed of trust as enabled him to execute a valid lease for a term not exceeding the life of the beneficiary named therein, and defendant entered under said lease, and has never been disturbed in possession, and no one except plaintiff has claimed any right to the rents, he cannot deny plaintiff's title in an action to recover the rents accruing after the death of the beneficiary, though such title ceased on the death of such beneficiary.[1]

**Tenant—Estoppel to Deny Landlord's Title—Presumption.**—Under Code of Civil Procedure, section 1962, subdivision 4, providing what presumptions shall be deemed conclusive, declaring that a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation, the conclusive presumption of the landlord's title having attached, it continues until in some mode recognized by the law it may be rebutted.

APPEAL from Superior Court, City and County of San Francisco.

[1] Cited in the note in 38 L. R. A., N. S., 865, on right of tenant to show that landlord parted with or lost his title to a third person during tenancy.

Action by Charles Ashton, trustee, against the Golden Gate Lumber Company, to recover rent. From a judgment for defendant and an order denying a motion for a new trial plaintiff appeals. Reversed.

Craig & Meredith, Evans & Meredith and Lester H. Jacobs for appellant; Chas. S. Wheeler and Bishop & Wheeler for respondent.

HAYNES, C.—Action to recover rent. Findings and judgment were for the defendant, a corporation, and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The complaint set out an indenture of lease, executed by the parties hereto in January, 1892, whereby the plaintiff leased to the defendant a parcel of ground 275 feet by 137.6, being part of a fifty-vara block No. 99, in the city of San Francisco, for the term of fifteen years, at a specified rental, payable monthly, and alleged possession taken by defendant thereunder, which possession has been ever since continued, and that the rent for certain months in the year 1895 had not been paid. For a first defense the defendant denied each and every allegation of the complaint. For a second defense it was alleged that on October 19, 1887, Solomon Heydenfeldt, being the owner in fee simple of said premises, executed and delivered to the plaintiff a deed, conveying to him the said leased premises, in trust: "First, to take and hold possession of said land, and to rent and lease the same to as great extent as I could or might do before the execution of these presents." The second, third, fourth and fifth items provided, in substance, that the trustee should collect the rents, pay the taxes, etc., and, after retaining five per cent of the rents as compensation, to pay, so far as the rents were sufficient, for the boarding, lodging, washing, office rent and clothing of the party of the third part (Solomon Heydenfeldt, Jr.), and any surplus also to be paid to him. "Sixth. Upon the death of the party of the third part, leaving children, the trust shall end and the property be conveyed to such children. If he shall die, leaving no children, then to convey the same to the party of the first part, or, in case of his death, to his right heirs." This defense further alleged that said deed of trust constituted plaintiff's only title; that said indenture of lease was entered into

during the lifetime of said Solomon Heydenfeldt, Jr., who afterward died on the —— day of ————, 1894; that at the time of his death said Solomon Heydenfeldt, the grantor in said deed of trust, was dead; that said trust estate granted to the plaintiff ceased and determined upon the death of Solomon Heydenfeldt, Jr.; that plaintiff was thereby devested of all title to said premises, and of all title to or interest in said indenture of lease, and had no longer any right, power or authority to collect the rents, issues or profits of said premises; and that the rents sought to be recovered herein all accrued since he was devested of his title by the death of Solomon Heydenfeldt, Jr. The third defense alleged the making of the said trust deed and lease; the death of the grantor, and the said beneficiary; that the plaintiff was authorized to lease said premises for a term not exceeding the life of Solomon Heydenfeldt, Jr.; that said lease determined at his death; and that since that time defendant has not occupied said premises as the tenant or lessee of the plaintiff, but by and with the consent of the owners thereof. The defendant also filed a cross-complaint, setting out the same facts, and alleging that the plaintiff claims, adversely to the defendant, that said lease has not terminated, but is still in full force; that said claim is without right; and that plaintiff has no just claim whatever—and prayed that said adverse claim be determined, and for a decree that said lease ended and ceased with the life of Solomon Heydenfeldt, Jr., and that defendant is under no obligation to pay rent to the plaintiff. Demurrers interposed by plaintiff to the second and third defenses, and the cross-complaint, were overruled, and plaintiff answered said cross-complaint.

The court found that the lease was executed as alleged; that defendant entered under it and has ever since remained in possession, and has not been ousted therefrom, or restored or surrendered the same to plaintiff; that plaintiff has performed all the conditions on his part; that the rent for the time mentioned in the complaint has not been paid, though demanded; that Heydenfeldt was the owner of the premises at the date of the execution of said deed of trust; that plaintiff's only title was as trustee under said deed; that he had no other power or authority to lease said premises or collect the rents than that given by said deed; that Solomon Heydenfeldt, Sr., died in September, 1890, and that Solomon Hey-

denfeldt, Jr., died in 1894, unmarried and without children; that plaintiff's trust estate ceased upon his death; that plaintiff was thereby devested of all title to said lands, and of all right to collect said rents; that defendant has not since occupied the premises as tenant or lessee of the plaintiff; and that no person has objected to the occupancy thereof by the defendant. It was further found "that no person has made any claim, prior to the commencement of this action, to the possession or for the rental thereof, or any claim at all concerning said premises against defendant adversely to the plaintiff," and "that, as a matter of fact, said Ashton has made no conveyance of said premises to any person or at all." The finding touching defendant's cross-complaint was in accordance with its allegations. As conclusions of law the court found that plaintiff was not entitled to recover in this action, and also "that defendant is entitled to a decree adjudging the matters and things set forth in the decree signed by the court contemporaneously herewith, and to be filed herewith, which said decree counsel have stipulated and agreed may for all purposes be considered part of these conclusions of law." Said decree gives a construction of the trust deed, and the powers and rights of the trustee thereunder, in accordance with the contentions of defendant that it is under no obligation to the plaintiff to pay rent, or perform any obligation of said lease, and concludes as follows: "And it is further ordered, adjudged and decreed that the plaintiff, Charles Ashton, trustee, and any and all persons claiming under or through him as such trustee, or under or through him as the lessor in said lease set forth in plaintiff's complaint, or under any of the covenants in said lease, be, and they hereby are, restrained and forever enjoined from asserting such claims, and each and all of them, against said defendant." Several exceptions were taken by the plaintiff during the trial, and his motion for a new trial was based upon these, and upon certain specifications of the insufficiency of the evidence to justify the findings. The questions involved in this appeal, however, are radical, and may be discussed without special reference to the exceptions or specifications, further than to say they are sufficient to authorize such discussion.

It is conceded by respondent that Ashton had such title and authority under the deed of trust as enabled him to

execute the lease, and that it was valid for a term not exceeding the life of Solomon Heydenfeldt, Jr.; that defendant entered under said lease; that it has never been evicted, or its possession disturbed; and that no one, except the plaintiff, has ever claimed any right to receive or collect any rent or other compensation for defendant's use and occupation of the premises, the possession of which it received from the plaintiff under said lease. But it is claimed that, Solomon Heydenfeldt, Jr., having died, plaintiff's estate and title, and his right and authority to collect the rents, thereupon ceased, and that the defendant may plead such expiration of plaintiff's title as a bar to his action to recover the rents accruing after the death of the life beneficiary. No general proposition of law is better sustained by the authorities, or has a firmer foundation in a wise public policy, than that a tenant who has received possession from his landlord is not permitted to deny the title of his lessor while the relation thus created subsists; but, as against the tenant, the title of the landlord is conclusively presumed to be perfect and valid. Respondent, however, contends that this proposition is limited or qualified by section 1962, subdivision 4, of the Code of Civil Procedure. This section provides: "The following presumptions, and no others, are deemed conclusive: . . . . (4) A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation." That is, as to the tenant, the presumption that the landlord had title at the commencement of the relation is conclusive. After that time the presumption that the landlord has title continues, but it is not conclusive. But how, and to what extent, may it be rebutted? The burden of showing that the landlord's title has ceased is upon the tenant. The conclusive presumption declared by the code having attached, it must continue until in some mode and under circumstances recognized by the law it may be rebutted; otherwise, the tenant may accept a lease and enter into possession to-day, and to-morrow repudiate the lessor's title, and hold possession in hostility to a title which the day before was conclusively presumed to be valid and beyond the power of the tenant to deny.

It is contended by respondent, however, that Ashton's title was terminated by the death of Solomon Heydenfeldt, Jr., and that by the same event the lease was terminated, and, as the rent sued for accrued after the termination of the lease,

the trustee could not maintain an action therefor. But if it be conceded that, as between Ashton, as trustee, and the right heirs of Solomon Heydenfeldt, the remaindermen, the trustee's title had ceased, it does not follow that the tenant, who was put in possession by the trustee under a lease for a term of years, could plead such determination of his landlord's title in an action for rent. The termination of the landlord's title, so long as the tenant remains in the undisturbed and unquestioned possession of the leasehold, no claim or demand for rent or compensation having been made by the successor in interest of the lessor, or by any person other than the lessor under whom he entered, is a matter of no concern to the tenant, and constitutes no defense to this action. If respondent's contention is sound, a tenant, having received possession from his landlord, may refuse to pay rent, though not disturbed in his possession by threat or otherwise, and even without asserting title in himself, and without surrendering possession, may, when sued for rent, litigate his landlord's title, and have it declared void, invalid or worthless, and his right to remain in possession without accountability for rent quieted by a solemn decree of the court. Respondent has in no way connected itself with the title or right of the heirs of plaintiff's grantor, or with any other owner, real or assumed, claiming in hostility to the plaintiff. Even if it had attorned to the heirs of Heydenfeldt, Sr., it would have availed nothing, since "the attornment of a tenant to a stranger is void, unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction": Civ. Code, sec. 1948; Thompson v. Pioche, 44 Cal. 508, 515. "A tenant cannot justify his attornment to a third party by merely showing that such party has recovered judgment against him for the possession of the premises. He must go further, and show that his landlord was notified of the pendency of the action, and had an opportunity to defend; otherwise, the landlord is neither bound nor estopped by the judgment": Douglas v. Fulda, 45 Cal. 592. In Schilling v. Holmes, 23 Cal. 227, 230, after speaking of the duty of the tenant, who has been dispossessed by a stranger, to take legal proceedings to recover possession, that he may discharge his duty of surrendering possession to his landlord, the court said: "But, until the tenant has performed this duty of restoring full and complete possession to his landlord, he

still remains liable to the latter for rent. His liability to pay the rent is not discharged by an eviction, unless under a title superior to his landlord's, or by some agency of the landlord." In Ghirardelli v. Greene, 56 Cal. 629, it is said: "The real questions in issue were the making of the lease, the entry under it, and rent due. If the defendants entered under a lease, they could not dispute the title of their landlord. If they did not enter under a lease, he could not recover in this action, because he based his right to recover upon such a lease. Therefore the defendant's allegation of title in somebody else raised an immaterial issue, and that allegation might have been stricken out or disregarded altogether." In Reynolds v. Lewis, 59 Cal. 20, it was said: "Lewis appears to have occupied the land with the permission of Reynolds, and he cannot avoid the payment of the value of its use and occupation to Reynolds, on the ground that the latter had no right to lease the land to him."

The cases cited by respondent to the proposition "that a tenant may always show, if he can, that his landlord no longer holds title," remain to be noticed. McDevitt v. Sullivan, 8 Cal. 593, 596, is not in point. It was contended by the plaintiff in that case that Sullivan was estopped to deny McDevitt's title. But the court said: "Sullivan did not obtain possession under McDevitt, and he is not estopped from showing that the attornment to McDevitt was made under a mistake of fact." That case was, therefore, within a recognized exception to the general rule. Corrigan v. City of Chicago, 144 Ill. 537, 21 L. R. A. 212, 33 N. E. 746, has no application to any question in this case. There the property was leased for a term of years, and afterward the whole of the property covered by the lease was condemned and paid for by the city for street purposes, and it was held that the whole of the title, both of the landlord and tenant, was extinguished, and the tenant thereby relieved from the payment of rent, and that the tenant could plead such extinguishment in bar of an action for rent accruing thereafter. In Lamson v. Clarkson, 113 Mass. 348, 18 Am. Rep. 498, the plaintiff had an estate in the premises for the life of Lancy, and leased to defendant for one year, rent payable monthly. Lancy died during the term, and this action was for rent accruing after his death. Drake owned the reversion, and served notice on the tenant not to pay rent to Lamson. Defendant knew of Lancy's death, and

of Drake's claim to title. The defendant refused to pay to either until he could ascertain where the title was. This suit was brought by Lamson, the lessor, after the term expired. A judgment for the plaintiff was reversed.

The distinction between these cases and the one at bar is too clear to require elaboration, and no others are cited to this point by respondent. In Bigelow on Estoppel, fifth edition, 511, it is said: "But, permissive possession being the ground of the modern estoppel, it is clear that the estoppel will prevail so long as such possession continues, though the contract of lease was void. And the authorities upon this point are numerous": See Bailey v. Kilburn, 10 Met. (Mass.) 176, 43 Am. Dec. 423; Miller v. Lang, 99 Mass. 13; Morrison v. Bassett, 26 Minn. 235, 2 N. W. 851; Nims v. Sherman, 43 Mich. 45, 4 N. W. 434; Doe dem. Bullen v. Mills, 2 Adol. & E. 17; Fleming v. Gooding, 10 Bing. 549. In Nims v. Sherman, supra, Mr. Justice Cooley, speaking for the court, said: "One who is a tenant in fact, it is justly held, shall not dispute the title under which he has obtained possession, even though he has since acquired a better title; but, when he has surrendered the possession obtained by means of the tenancy, he may at once turn about and try titles with his late landlord." The foregoing principles are directly sustained in Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245 (a case of bailment), and Jeffers v. Easton, 113 Cal. 345, 45 Pac. 680. In both of these cases the rule stated by Wilde, J. (6 Rob. Pr. 364), is quoted, thus: "If the lessee is disturbed in his occupation by a party having a title paramount to that of his lessor, so that he cannot legally continue his occupation under the lessor without rendering himself liable to the other party, he may yield the possession, and take a new lease under him, or he may abandon the possession, and, in either case, he will thereafter not be liable to pay rent to the original lessor. Such an entry and disturbance are equivalent to an ouster."

Eliminating from the findings of fact those expressions which are mere conclusions of law, they require a judgment for the plaintiff as prayed for, and I therefore advise that the judgment and order appealed from be reversed, with directions to the court below to enter judgment for the plaintiff as prayed for.

We concur: Cooper, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with directions to the court below to enter judgment for the plaintiff as prayed for.

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## COWDERY v. McCHESNEY.

Sac. No. 591; July 25, 1899.

58 Pac. 62.

**Expert Witness—Qualification.**—In an Action to Recover for Personal Services in nursing and caring for defendant's testator, plaintiff introduced as an expert witness as to the value of the services a woman of experience in the same kind of work, and who had seen the nature of plaintiff's services on the ranch where they were performed. In answer to the question, "From your experience, and what you saw on the ranch, are you able to say what such services are reasonably worth?" she replied, "Well, I am able to tell what I think." Held, that the court erred in excluding the testimony on the ground that witness had admitted her incompetency.

APPEAL from Superior Court, San Joaquin County.

Action by Minnie E. Cowdery against Clark McChesney, as executor of George M. Kasson, deceased. From a judgment for defendant, plaintiff appeals. Reversed.

Minor & Ashley for appellant; John A. Percy, Budd & Thompson and Nicol & Orr for respondent.

GRAY, C.—This action is brought to recover the reasonable value of certain services, as housekeeper, superintendent of the household and domestic affairs, and as nurse, alleged to have been performed by plaintiff for her deceased uncle, George M. Kasson, in his lifetime. For several years immediately preceding the death of Kasson he was afflicted with various disorders of body and mind which rendered it necessary that he should have the constant attention of someone to take care of his person and home. He engaged the plaintiff to perform this service for him, agreeing that she should be well paid. To show the value of her services, the plaintiff called as a witness Mrs. S. A. Hathaway, who testified to her acquaintance with deceased; that she had been at his house

the night before and on the morning of his death, and had observed what was necessary to be done to take care of him properly; and that she had occupied a position at the state insane asylum as a keeper of a ward, it being her duty to superintend the ward, and see that the work of caring for the patients was properly done. She was then asked, "From your experience at the asylum, and what you saw on the Kasson ranch, are you able to say what such services as Mrs. Cowdery rendered there were reasonably worth?" to which the witness answered, "Well, I am able to tell what I think." Plaintiff then asked her, "What were the services rendered by Mrs. Cowdery upon the Kasson ranch reasonably worth, if you know?" This question was objected to on the ground "that the witness has shown, by her own examination, that she is not competent to testify." It would seem that the court erred in sustaining this objection. The testimony of the witness shows that she was in a position to give an intelligent opinion as to the reasonable worth of the plaintiff's services in caring for her afflicted uncle, and the question objected to was therefore competent and proper. When plaintiff rested her case, no evidence had been elicited as to the value of her services; consequently the above ruling of the court was prejudicial to her rights. On account of this error we advise that the judgment and order denying a new trial be reversed.

We concur: Britt, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

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## WATSON v. MILLER et al.

**S. F. No. 1281; August 3, 1899.**

**58 Pac. 135.**

**Administrator.—In an Action Against an Administrator, it is** not reversible error to overrule a demurrer by plaintiff to the complaint of intervening heirs, when the issues presented are the same as those raised by the answer of the administrator, and judgment must be the same as though the demurrer had been sustained.

**Administrator.—In a Suit for $30,000 Against an Administrator for Services** performed for testator, a finding that plaintiff performed

work, the value of which did not exceed $500; that the deceased did not promise to pay for the services, but they were understood to be gratuitous; and that plaintiff was paid and received the sum of $500 in full payment, is sufficient to support a judgment against plaintiff.

**Administrator.—In an Action Against an Administrator for Services** performed for deceased, where the complaint alleges that deceased promised to pay for such services, and the answer denies the promise, a finding that deceased did not promise is not outside the issues.

**Administrator.—In an Action Against an Administrator, a Former** administrator of the same estate was introduced as a witness. In cross-examination the decree of revocation of his letters of administration was introduced, and objected to as not being proper cross-examination and as irrelevant and immaterial. No part of the evidence in chief was set out, and the bill of exceptions did not set out the decree of revocation. Held, that the appellate court cannot pass upon this exception.

**Administrator.—In an Action Against an Administrator for Compensation** for services performed for testator, evidence that testator had expressed himself as not wishing to go away owing any man anything is immaterial.

**Evidence.—Where, on Objection to Testimony, Counsel Introducing** it explains that it is part of a conversation introduced by opposing counsel, and the court admits it, and it subsequently turns out to be immaterial, if no motion to strike it out is interposed the prejudiced party cannot complain.

**Administrator.—In an Action Against an Administrator for Compensation** for services performed for testator, a partner of plaintiff testified that plaintiff told him that he was attending to testator's affairs. Testator was not present when this statement was made. Defendant's counsel objected to the evidence, and questioned the witness with the object of showing that he was an interested party, following it by an objection to the testimony, which the court sustained. The testimony already given was not stricken out, nor did plaintiff's counsel offer any further testimony by this witness. Held, that the appellate court will not reverse, even though the objection was erroneously sustained, as the evidence of the witness was retained, and it cannot be assumed that any further facts would have been proven by him.

APPEAL from Superior Court, City and County of San Francisco.

Action by Peter W. Watson against Eliza M. Miller, as administratrix of the estate of A. P. More, deceased. Certain heirs intervened. From a judgment for defendants, plaintiff appeals. Affirmed.

Reel B. Terry for appellant; John B. Mhoon and C. A. Storke for respondents.

PER CURIAM.—The plaintiff brought this action against the administrator of the estate of A. P. More, deceased, to recover the sum of $30,000, claimed to be the reasonable value of work, labor and services alleged to have been performed by him, for and at the request of said A. P. More, within two years prior to his death. A complaint in intervention was filed by two of the heirs of the deceased, and the plaintiff's demurrer thereto was overruled. Upon the trial of the cause the court rendered judgment against the plaintiff, from which, and from an order denying his motion for a new trial, he has appealed.

1. Appellant contends that the court erred in overruling his demurrer to the complaint of the interveners; that an heir is not entitled to intervene in an action brought against the administrator to recover a claim against the estate. It is not necessary, however, to determine this question upon the present appeal, since the issues presented by the complaint in intervention were the same as those presented by the answer of the administrator, and the findings of the court against the allegations of the complaint, as well as the judgment thereon, must have been the same had the plaintiff's demurrer to this intervention been sustained. The order overruling his demurrer is not, therefore, a sufficient ground for reversing the judgment.

2. It is next urged as a ground for reversal that the findings of fact are insufficient to support the judgment, in that there is no finding that plaintiff did not perform the services alleged in the complaint to have been rendered, and that it is not found that such services as alleged were not of the value of $30,000. The court found "that the plaintiff, within two years prior to the death of A. P. More, deceased, performed work, labor, and services for and at the request of said A. P. More, which said work, labor, and services did not exceed in value five hundred dollars; that said A. P. More, deceased, at no time promised and agreed to pay the plaintiff for any services mentioned in the complaint any sum whatever, but that all services which plaintiff performed for decedent during said two years were mutually understood and agreed between plaintiff and defendant to be gratuitous, and to be rendered without

charge, and were such services as a broker usually renders gratuitously to a customer who is doing other business with him; that, for such services found to be performed as aforesaid, plaintiff was paid and did receive the sum of five hundred dollars in full for such services, and gave his receipt in full therefor." These findings might have been greatly condensed, but they are clearly sufficient to support the judgment. It is said, however, that the finding that More did not promise to pay plaintiff for said services is outside of the issues. The answer denied that More ever promised or agreed to pay plaintiff for said services, thus raising an issue upon the allegation of the complaint that he did so promise and agree. But, if it were otherwise, it would not affect the judgment, since it was found that his services were worth no more than $500, and he was paid that sum, and received it in full.

3. It is further contended that the court erred in certain rulings upon the trial. J. F. More, who was the administrator of said estate at the time this action was commenced, was called as a witness for the plaintiff. Upon cross-examination he testified that he did not know whether he was then the administrator of said estate or not; that his letters were revoked, but he could not give the reasons why they were revoked. The defendant offered in evidence the findings and decree revoking the letters of the witness as administrator of said estate, and plaintiff objected that it was not cross-examination, and was irrelevant and immaterial. As no part of the evidence of the witness in chief is set out or stated, we cannot say that it was not proper cross-examination; and as the bill of exceptions neither sets out said findings and decree, nor gives any statement of the facts shown thereby, we cannot say that plaintiff was prejudiced, even if its irrelevancy and immateriality were conceded. Certainly we are not able to say that it tended to discredit the witness.

W. H. Chickering, called by the plaintiff, was asked upon cross-examination, "Did you have any conversation with Mr. More with reference to his indebtedness to anybody?" Plaintiff objected that it was incompetent, immaterial and irrelevant. Counsel for defendant explained that it was a part of a conversation put in by the plaintiff. The court thereupon overruled the objection, and the witness answered: "It was a few days before Mr. More went away. I was at his room in the Palace Hotel at his request, and as I went away he

asked me whether he owed me anything, and I told him no. And then he said that, if he did, he wished I would send him a bill and let him pay it, as he did not propose to go away owing any man anything." In view of counsel's explanation, the ruling was proper. The evidence given was, however, incompetent for the purpose of proving that More denied any indebtedness to the plaintiff, if it could be so construed, and would doubtless have been stricken out if counsel for plaintiff had requested it. He cannot, therefore, complain, even if he was prejudiced by the answer. But we do not see any reason to suppose that the court gave it any consideration, or that plaintiff was in any way prejudiced.

Henry Marx, called by the plaintiff, testified that he and the plaintiff were partners in the wool business, and that he was in the fur business with his brother; that he knew A. P. More; that he had seen him and Watson together a great deal; that Watson made out his shipping and consignment papers and wrote his letters for him; that was in the spring of 1890; that witness had no interest in this suit; that plaintiff's services to More were rendered for himself. The witness was then asked: "Did you and Mr. Watson ever have any understanding as to his being allowed to attend to this business, and as to what you could be allowed to do in relation to your fur business? If so, state it. A. Well, now, Mr. More was around the office a great deal, and I asked Mr. Watson what business he had with Mr. More, and he told me he was attending to his business." Counsel for defendant objected to the answer "as being a declaration in his own interest not made when Mr. More was present." Counsel for plaintiff repeated that he wished to show that plaintiff and Marx had an understanding that plaintiff was allowed to do this business for More, and the witness Marx could attend to his fur business. Defendant's counsel then asked the witness: "Did the firm of Watson & Marx receive pay for handling and scouring the wool of A. P. More? A. Yes, sir. Q. Did you get your share of it? A. Yes, sir. Q. You got your share of all the money paid to Watson & Marx for doing the business and handling the wool of A. P. More, did you not? A. Yes, sir." Counsel for defendant then said: "Now, I think the witness has clearly shown that he is interested in all the business done for A. P. More, and that he ought not to be allowed to testify to anything that happened

prior to the death of A. P. More." The court sustained the objection, to which ruling plaintiff's counsel duly excepted. There was no motion to strike out the testimony given by the witness, nor any offer to prove by him any additional fact tending to establish plaintiff's cause of action. The plaintiff therefore had the benefit of the testimony already given, and, in the absence of any offer to prove additional facts, we cannot assume that other facts were within the knowledge of the witness which would have tended to the benefit of the plaintiff. The judgment and order denying a new trial are affirmed.

## BUCKLEY v. MOHR.

L. A. No. 570; September 8, 1899.

58 Pac. 261.

**Boundaries—Maps of Different Additions to City.**—Where plaintiff in ejectment claims land under the official map of a certain addition to a city, and defendant claims under the official map of an adjoining addition, and it is stipulated that the map under which defendant claims is the official map of that addition, and that under it defendant has shown title to the land in controversy, and the evidence shows that such map is the one under which both parties have acted, it will be considered as the controlling map by which to locate the line between the two additions.

**Adverse Possession.—Where Plaintiff in Ejectment Claims the West** twenty-five feet of a certain lot on which a building is located, and the land in controversy consists of a certain number of feet off the east side of said strip of twenty-five feet, and the evidence shows that plaintiff and her grantors supposed they had located the building as far east as they claimed possession, and made no claim of possession to any land east of the building until after defendant inclosed the same, plaintiff cannot claim constructive adverse possession to the land east of said building.

APPEAL from Superior Court, San Diego County.

Ejectment by Mary Buckley against William Mohr. From a judgment in favor of defendant and an order denying motion for new trial plaintiff appeals. Affirmed.

Withington & Carter for appellant; A. C. Mouser for respondent.

CHIPMAN, C.—Ejectment. Defendant had judgment, from which, and from the order denying motion for new trial, plaintiff appeals. Block K of Horton's addition to the city of San Diego is fractional, and its west boundary line is the east boundary line of fractional block 2 of Middletown, the two fractional blocks extending from Front street on the east to Union street on the west, forming one entire block, being bounded as shown above on the east and west, on the south by C street, and on the north by B street. Plaintiff claims by a deed made to her in 1886, describing her land as follows: "Beginning at the southwest corner of block K, Horton's addition, thence easterly twenty-five feet, thence northerly one hundred feet, thence westerly twenty-five feet, thence southerly one hundred feet to beginning; being the same land previously conveyed to plaintiff's grantor by the San Diego and Los Angeles R. R. Co." It is otherwise known as the west twenty-five feet off lots G and H of Horton's addition. Defendant claims the east ninety-two feet of said lot G through conveyance which described a piece of land beginning at the southeast corner of said block K; thence northerly along Front street fifty feet; thence at right angles west to the west line of the block, which line divides this block and block 2 of Middletown; thence south along this line to C street; thence along C street one hundred and seventeen feet to the beginning, "excepting a strip off the west end of above tract of twenty-five feet wide from east to west on said C street by fifty feet long from north to south, deeded to the Texas Pacific Railway Company August 5, 1873." This excepted piece is the same as described in the complaint. When plaintiff's grantor bought the property, in 1886, he built a laundry upon it, which was then, and ever since has been, rented and used for laundry purposes. The building fronts twenty-two feet and three inches on C street, and extends back about fifty feet, and plaintiff's evidence tends to show that it was the intention of plaintiff's grantor to build the house entirely on the west twenty-five feet of lot G, with a space for a drainage sewer on the west side of the house to C street. Plaintiff made no use of any of the land lying along the east side of this laundry building, and no door opened on that side, but a door opened on the west side. In 1896 defendant inclosed his part of lot G with a fence, including in his inclosure all the land within six inches of the laundry.

Defendant claims that lot G runs back from Front street to the dividing line between block K of Horton's addition and block 2 of Middletown, one hundred and seventeen feet, according to Lockling's map of Horton's addition, and that his part of the lot is the east ninety-two feet, while he concedes that plaintiff's deed calls for the west twenty-five feet of the lot, to which defendant makes no claim. Plaintiff claims according to the Jackson map of Middletown, which gives eighty-seven feet as the width of block 2, and would locate the dividing line between the two blocks three feet six inches farther east than by Lockling's map of Horton's addition, and would reduce the length of lot G to one hundred and thirteen feet and four inches; and, as defendant concedes to plaintiff twenty-five feet off the west side of this lot, the Jackson map, if the true survey, would reduce defendant's lot from ninety-two feet to eighty-three feet and four inches, and would show defendant to be a trespasser. It was stipulated at the trial by the parties that Lockling's map of Horton's addition is the official map, and was filed June 21, 1871, "and that the south line of said fractional block K, in said addition, is marked thereon one hundred and seventeen feet long, and that said south line of said fractional block K is the south line of said lot G therein; that said map shows that Horton's addition has in it over four hundred blocks, each divided into twelve lots, designated by the letters A to L, and that the west half of each block is lettered A to F from north to south, and the east half G to L from south to north; that the Jackson map of Middletown is the official map of Middletown, and was filed October 19, 1874." It was stipulated that defendant showed valid title to the realty east of the property named in the complaint, by a description which, among others, describes lot G as running on C street one hundred and seventeen feet from the line dividing Horton's addition and Middletown.

It seems to me that the pivotal question is as to which of these two maps should prevail. A subordinate question is whether the occupation by the laundry building carried with it title by adverse possession to any land east of that building. That the Lockling map should prevail over the Jackson map seems quite clear from the evidence. The Middletown reservation comprised some six hundred and thirty-seven acres, more or less, having a frontage "along the line of low-

water mark on the bay of San Diego, and nineteen hundred and eighty feet easterly is the dividing line between Middletown and Horton's addition, running parallel with said low-water mark on said bay of San Diego." This Middletown reservation was partitioned by decree of court, and the map thereof is what is known as the "Jackson Map," which was filed October 19, 1874. There is no evidence that any of defendant's predecessors in interest were parties to that partition suit, or that it involved any of the other lands of the city of San Diego. It appears, however, that the remainder of the city's lands were surveyed and platted by Charles H. Poole, and divided in pueblo lots of one hundred and sixty acres each, and were so designated on the official map thereof by Poole in 1856; and on May 11, 1867, the city conveyed to Horton certain six of these pueblo lots as designated on the map of 1856 (among which was the lot in which block K is situated), and these pueblo lots were subsequently subdivided by Horton, and the official map thereof duly filed June 21, 1871. The deed under which plaintiff claims begins its description at the southwest corner of block K of Horton's addition, and the evidence is that plaintiff's part of lot G has generally been described as the west twenty-five feet of lot G of Horton's addition. We think the evidence, stipulated and otherwise, sufficiently establishes the fact that the Lockling map of Horton's addition, and not the Jackson map, has been the one upon which all the parties have acted. And, as it is stipulated that lot G has a depth of one hundred and seventeen feet east and west from Front street, it seems quite plain that, so far as the conveyances should control, defendant has a clear right to the land he has inclosed, and he claims no more. We do not wish to be understood as deciding for all purposes, and in all cases which may hereafter arise, that the dividing line between block K of Horton's addition and block 2 of Middletown must be located by the Lockling map. We only decide that in the case here it must be so done, upon the evidence before us.

But plaintiff claims that, if it be that she has failed to prove perfect title by deed, she yet has proved title by adverse possession. The evidence is that her grantor took possession of what he supposed was the west twenty-five feet of lot G as laid down on the Lockling map of Horton's addition. He built upon that assumption, and the house is where it was

placed in 1886. Plaintiff's witness testified: "Before I obtained any interest in this property, in 1886—possibly in 1885—I went to it with Santee [his grantor], who showed me this twenty-five feet on C street. He pointed it out, and located it where we built the laundry, which has been occupied, ever since we built it, as a laundry. We built a sewer, at great expense, on the west side of this twenty-five feet. It was not put on the line, but on this twenty-five feet." Again he testified: "We had a map there, and he showed me the west line of the twenty-five feet from the map, . . . . and he indicated to me the fact that we had twenty-five feet off the west end of lots G and H of fractional block K. . . . . I do not remember how much of our twenty-five feet we left on the east side of the laundry, nor how much on the west side. There was never any fence on either side of the laundry, that I know of. There was nothing there but the laundry. Before we put the wash-house there, we measured off our twenty-five feet. Then the sewer was expensive, and we aimed to be right about it, so we had a survey made. We had someone make a survey before we put the sewer in, and we put it on the westerly part of our twenty-five feet. We did not aim to put it on any line. We aimed to get it inside of our own domain." For purposes of taxation this piece was variously described. Plaintiff's agent since 1889 testified that it has been generally described as the "west twenty-five feet of lot G." It seems to me that the evidence warrants the inference that plaintiff and her grantors supposed they had located the laundry as far east on the lot as they claimed possession. The building is stated by one witness to be twenty-three feet and three inches, and by another witness twenty-two feet and three inches, wide. The latter of these measurements would leave but two feet nine inches for the sewer, which was built west of the house, and within the twenty-five feet claimed; there was a door leading out to the west, but no door or entrance from the east. The evidence tends strongly to show that no claim of possession or right of possession was set up by plaintiff or her grantor to any land east of the laundry. We do not see how the doctrine relied upon by plaintiff, as to constructive possession of a large tract while in actual possession of only a portion, can apply, for the evidence shows that the entry was upon the whole tract called for by plaintiff's deed, as the claimants

understood their rights. They never occupied or made claim to any land east of the building until after defendant built his fence. Plaintiff's adverse possession was of the west twenty-five feet of the one hundred and seventeen feet of lot G of Horton's addition, and we do not see how she can claim constructive adverse possession beyond this, in view of the evidence in the case. How far in the other direction her adverse possession may be maintained, in order to give her the full twenty-five feet front on C street, it is not our intention to intimate. All that is intended to be decided is that the evidence fails to support her claim to the land she now seeks to recover, and we therefore advise that the judgment and order be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## MORE v. FINGER et al.*

L. A. No. 548; September 11, 1899.

58 Pac. 322.

**Replevin—Negotiable Paper.—Where Defendants Obtained** possession of a note from one whom they knew had parted with his title thereto, plaintiff is entitled to recover possession thereof, without restoring to defendants any amount which they may have paid the pledgee of the note in order that they might fraudulently gain possession of same.

**Replevin—Negotiable Paper.—Evidence That Defendants** were mutually engaged in the accomplishment of the common purpose of obtaining possession of a note, and did obtain possession of it by a deal made with plaintiff's husband, who they knew had parted with all title to the note, and while he was intoxicated, is sufficient to support a verdict in favor of plaintiff.

**Conspiracy.—Circumstantial Evidence Tending to Prove** a conspiracy is properly admissible, with the qualification that if a conspiracy is not shown such evidence may be stricken out on motion.

**Promissory Note—Holder in Due Course.—Receipts Indorsed** on a promissory note, and signed by the payee, do not make the

*For subsequent opinion in bank, see 128 Cal. 313, 60 Pac. 933.

holder of the note the indorsee thereof, within the meaning of Civil Code, section 3124, providing that the indorsee of a negotiable instrument, in due course, acquires an absolute title thereto.

Promissory Note—Holder in Due Course.—An Instruction That if the jury believe that there was known, at the time of the transfer of a note, facts sufficient to arouse the suspicions of an ordinarily prudent person, then the purchaser of the note cannot defeat the title of the true owner, is immaterial, where it appears, without conflict, that the parties so purchasing the note are not indorsees of the note, and therefore received no better title than the assignor had.

APPEAL from Superior Court, Santa Barbara County.

Action to recover possession of a promissory note by Louise J. More against H. F. Finger, E. F. Rogers, Thomas R. More and Otto Kaeding. From a judgment for plaintiff, defendants Finger and Rogers appeal. Affirmed.

C. A. Storke for appellants; Boyce & Taggart and Richards & Carrier for respondent.

GRAY, C.—This is an action of claim and delivery. The plaintiff had judgment, and defendants Finger and Rogers appeal from the same, and also from an order denying them a new trial. The amended complaint sets out the following facts: Plaintiff is the wife of Wallace H. More. On the 17th of April, 1894, Thomas R. More executed to his brother, Wallace H. More, his promissory note for $3,500, due two years after date, and thereafter paid $500 on said note. That thereafter said Wallace borrowed from defendant Kaeding $25, giving his note therefor, and delivered to Kaeding the Thomas R. More note as collateral security for said $25. That thereafter, on December 3, 1894, the plaintiff and her husband borrowed $15 from Kaeding, gave their notes for it, and agreed that the said Thomas R. More note should be held as collateral security therefor. That thereafter, on December 12, 1894, Wallace H. More gave and assigned, by an instrument in writing, the said Thomas R. More note to the plaintiff, and that plaintiff since "has been, and now is, the true and lawful owner of said promissory note, as her sole and separate property." That after notice to the defendants, and with full knowledge on their part of the said assignment to plaintiff by her husband, the defendants conspired and confederated to cheat and defraud the plaintiff out of said note;

and, in pursuance of such conspiracy, the brother of Wallace, Thomas R. More, by certain tricks, separated her husband from plaintiff, and plied him with liquor until he was so drunk that he did not know what he was about, and while he was in that condition procured a transfer and assignment of the note in controversy from him to one of their number in exchange for about $290 in money, a duebill for $100, and a pretended conveyance of a piece of property of little or no value, each and all of the defendants then and there well knowing that the said note was the sole and separate property of plaintiff. The value of the note is then alleged, and plaintiff prays judgment for the return of the same to her, or the value thereof, in case a return cannot be had.

The facts set forth in this amended complaint show that the plaintiff has a good cause of action against the defendants in claim and delivery, and it is not open to the objection that two causes of action have been improperly joined therein. Nor is it amenable to any of the special objections set forth in the demurrer to it interposed by the appellants and referred to in their brief. That the amended complaint does not allege a payment or an offer to pay the amounts for which the note was pledged to the defendant Kaeding is not an objection thereto available to the appellants. Kaeding has not appealed, nor did he demur to the amended complaint.

The appellants having wrongfully acquired possession of plaintiff's property by a deal with one who they knew had parted with his title thereto, as against them plaintiff was entitled to the possession thereof without restoring to them the amount which they had voluntarily paid to the pledgee of the note, that they might, for the purpose of defrauding plaintiff, gain possession of the same. After he had transferred and surrendered the note, Kaeding had no further right to or in it.

Appellants stoutly contend that the evidence is insufficient to justify the verdict. To this we cannot consent. The main question in dispute in the case related to whether the appellants and defendants had knowledge of the transfer of the note from Wallace More to the plaintiff at the time they were making their deal with Wallace in reference thereto. The plaintiff testified that she had personally told the defendants Kaeding and More, prior to the surrender thereof to said defendant More, that she was the owner of the note; that her

husband had assigned it to her; and though in this she was flatly contradicted by both those defendants, in support of the verdict and the order denying a new trial we must treat her testimony as true and decisive of that question of fact. It appears, further, that all the defendants were engaged in an effort to trade Wallace More out of the note in controversy, and that they were each and all interested and actively engaged in the accomplishment of this common purpose is plainly apparent from the evidence. That they were meeting with some difficulty at the hands of the plaintiff in accomplishing this purpose is also plainly apparent. Rogers, who was confessedly the agent for Finger in the transaction, besides being interested in it on his own account, had been told by the plaintiff that she did not want any real estate for the note, and she had plainly indicated to him that the trade which was finally accomplished with Wallace could not be made with her consent. In view of this direct evidence of notice, to some of the parties interested in the trade, of plaintiff's ownership of the note, and in view of the means and methods that were resorted to to secure the relinquishment of the note without the knowledge and consent of the plaintiff, and all the other circumstances surrounding the transaction, we cannot say that the jury, as well as the learned judge before whom the case was tried, were not warranted in reaching the conclusion that these appellants had knowledge of the previous transfer of the note to plaintiff, but proceeded with their trade with her husband upon the theory that their knowledge could not be made to appear, and they would occupy the position of bona fide purchasers of the note. The appellants, in their answer, admit that Wallace H. More did "transfer, sell and deliver and assign to them" the note in controversy. If they accepted this assignment and delivery with knowledge of the previous assignment to plaintiff, then they could not shield themselves behind the law-merchant, but the trade was a nullity for that reason, and they acquired no right whatever to the possession of the note as against the plaintiff, who was the true owner. The jury in their general verdict impliedly found that appellants took the note with knowledge of plaintiff's rights thereto and were not bona fide purchasers thereof, and, as we have already seen, there was evidence to support such a finding. This view of the case

disposes of all the points in appellants' brief as to insufficiency of evidence.

It is objected that the court erred in permitting plaintiff to testify as to the acts and declarations of Thomas R. More, as against appellants, before proof of a conspiracy between these defendants and said Thomas R. More was had. The court, in overruling the objection to this evidence at the trial, said: "Of course, if there is no conspiracy shown, these remarks cannot be taken as against your client"—meaning, evidently, the remarks of Thomas More sought to be put in evidence. The court doubtless had in mind that the plaintiff proposed to establish the conspiracy by circumstantial evidence—that is by showing that the defendants had pursued by their acts the same object, each with the same evident purpose in view—and this statement of the court was a clear intimation that, if no conspiracy was made to appear, the testimony objected to was not to be considered by the jury as evidence. It was perfectly proper to admit the offered evidence with such qualifications, and then, on failure to establish the conspiracy, it could have been stricken out on motion. It has been held that a conspiracy can be established by showing the conduct of the several parties to it evidencing a common purpose: People v. Bentley, 75 Cal. 407, 17 Pac. 436. But it is manifest that this could not be done if the trial court excluded the evidence of the conduct of each on the objection of the others that a conspiracy had not already been shown. The opinion which the court seems to have had at the conclusion of the evidence, that a conspiracy had been shown, was not without evidence to support it.

It is claimed that the court erred in instructing the jury that, "if the jury believe from a preponderance of the evidence that there was in the transaction sufficient to arouse the suspicions of an ordinary prudent person, then the purchaser of the note cannot defeat the title of the true owner." It is not necessary to determine whether this instruction properly states the rule applicable, where the contention is that a party stands in the position of a bona fide purchaser of a negotiable instrument, for the reason that it appears without conflict that the appellants were not the indorsees of the note in controversy, and consequently not in a position to claim the protection of the law-merchant. The note and the indorsements on it were placed in evidence, and they read as follows:

"3,500.00. Santa Barbara, April 17, 1894.

"For value received, two years after date I promise to pay to Wallace H. More or order the sum of thirty-five hundred dollars ($3,500) in gold coin of the United States of America, with interest thereon in like gold coin at the rate of six per cent. per annum from date until paid. Interest payable annually, and if not so paid to be added to the principal and draw a like rate of interest.

"THOMAS R. MORE."

Indorsed: "Received on the principal of the within note the sum of five hundred dollars. April 27, 1894. Wallace H. More."

"Received from Otto Kaeding twenty-five dollars. Wallace H. More."

"Received from Otto Kaeding fifteen dollars. Wallace H. More."

Receipts indorsed on a promissory note, and signed by the payee, do not make the holder of the note the indorsee thereof, within the meaning of section 3124 of the Civil Code: Central Trust Co. v. First Nat. Bank, 101 U. S. 68, 25 L. Ed. 876; McCrum v. Corby, 11 Kan. 464; Hadden v. Rodkey, 17 Kan. 429; Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. 473; Moore v. Miller, 6 Or. 254, 25 Am. Rep. 518; Pickering v. Cording, 92 Ind. 306, 47 Am. Rep. 145. The appellants therefore received no better title than their assignor, Wallace More, had, and he, having previously assigned the note to his wife, had nothing left to assign. This view of the case not only makes the instruction complained of immaterial and devoid of any injury to appellants, but it also makes the instruction requested by them and refused by the court immaterial, and is at the same time a complete answer to every contention made by them on the theory that they occupy the position of indorsees of the note. The evidence, without conflict, shows that they are not such indorsees. The note was assigned and delivered to them according to the admissions of their answer, but it was never indorsed to them. For these reasons we advise that the judgment and order appealed from be affirmed.

We concur: Cooper, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

# METHVIN v. FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA.*

L. A. No. 720; September 13, 1899.

58 Pac. 387.

**Life Insurance—Delivery—Payment of Premiums.**—A policy dated July 30th, calling for quarterly premiums, provided that it should not be binding until delivered and its first premium paid. It was not delivered, nor the first premium paid, until September 3d, and insured died in November following. Held, that the policy did not begin to run until September 3d, and was in force for three months thereafter, and hence was not forfeited for failure of assured to pay the quarterly premium, which would have been due October 30th, had the policy taken effect on the day of its date.

**Life Insurance.—Where a Policy Required Proof of Death** to be made on blank forms furnished by the company, and declared that no action should be brought on it after one year from the date of insured's death, without reference to the time of furnishing the proofs of the death, such requirements must be construed together, and, if failure to bring the action within one year was occasioned by the company's refusal to furnish the blanks required, it is not entitled to urge the limitation to defeat plaintiff's recovery.

**Life Insurance.—Where a Policy Declared That Proof of Death** should be made on blanks furnished by the company, and that no action should be begun after one year from assured's death, without reference to the time of furnishing such proofs, the words in the limitation clause, "without reference to the time of furnishing proofs of death," refer only to the time when proofs are furnished, and do not apply to a case where the making of proofs of death was prevented by the company's refusal to furnish blanks.

APPEAL from Superior Court, Los Angeles County.

Action by J. M. Methvin against the Fidelity Mutual Life Association of Philadelphia, Pennsylvania. From a judgment in favor of plaintiff and from an order denying a new trial defendant appeals. Affirmed.

R. L. Horton for appellant; McKinley & Graff for respondent.

GAROUTTE, J.—This action is based upon a policy of life insurance. Plaintiff recovered, and the appeal is taken from the judgment and order denying a motion for a new trial.

*For subsequent opinion in bank, see 129 Cal. 261, 61 Pac. 1112.

Had the policy lapsed and become forfeited at the time of the death of the insured? These are the facts: While the policy was dated July 30, 1895, it was not delivered to the insured until the third day of the following September, at which time the first quarterly premium was paid. There is a clause in the policy providing that it would be in no way binding, or of any force or effect, until delivered to the insured and the first quarterly premium paid. It necessarily follows that the contract of insurance went into effect September 3, 1895. A quarterly premium of $24.96 was to be paid for the period of twenty years, on or before the thirtieth day of July, October, June and April of each year. Upon this state of facts, it is manifest that when the insured received his policy and paid his quarterly premium he was insured for three months from September 3d, the date when the policy went into force and effect. The insured died in November, 1895, and we see no reason why his policy of insurance was not alive and in full force at that time.

It is claimed that the policy was forfeited eo instanti upon October 30, 1895, because the second quarterly premium was not paid upon that date. This contention is based upon a clause of the policy which declares that this policy "shall be ipso facto null and void if premiums are not paid when due." The construction of the policy here contended for would recognize and approve a harsh doctrine indeed. It would be carrying the doctrine of forfeiture to unconscionable lengths. By payment of the first quarterly premium, the deceased was insured for three months. This was necessarily the contract between the parties. This clause of forfeiture for nonpayment of premiums was never intended to forfeit the privileges of insurance already paid for. No insurance policy ever attempted to do such a thing. This contention, if sound, would not only result in the forfeiture of present paid-up insurance, but would result in the forfeiture of a portion of the premium already paid. Upon rules of construction even liberal to defendant, it cannot be claimed that the forfeiture clause of the policy for nonpayment of premiums was any more than a forfeiture of the policy to take place upon the expiration of the period during which there existed paid-up insurance. The insured died at a time when the policy was in full force and effect, and, there being no forfeiture at that time, his representative has a good cause of action.

It is now insisted that this action was begun too late. This insistence is based upon the following clause found in the policy: "No suit or action hereon shall be begun or maintained after the expiration of one year from the day of death of the member, without reference to the time of furnishing the proofs of death, and such lapse of time shall be a conclusive bar to any recovery hereon, any statute to the contrary notwithstanding." This action was begun more than one year after the death of the insured. It is now claimed upon the part of plaintiff that this provision was waived by defendant. The policy contained a clause to the effect that the proofs of death and claims required shall be made upon the "blank forms furnished by the association." Another clause provided that the insurance money would be paid "within ninety days after receipt of satisfactory proof of death of said member, and the justness of the claim hereunder, in form required by the said association." Upon the foregoing branch of the case the court found that these blank forms could not be had except from defendant; that in proper time plaintiff requested the defendant to furnish the forms upon which to make proofs of death, etc., but that defendant failed and refused to furnish them; that plaintiff has repeatedly since the death of the insured demanded of defendant such blanks, but has been continually refused and is still refused. The court further found that upon September 21, 1897, plaintiff again demanded of defendant such blanks, but was refused; whereupon plaintiff elected to treat such refusal as a waiver of the right to proofs, and thereupon began this action. Upon the foregoing facts it was held by the trial court that the clause of the policy requiring the action to be begun within one year from death was waived. By one provision of the contract of insurance, plaintiff could not bring his action until ninety days after proof of death. By another clause of the contract of insurance, blanks for this proof of death, and the form of the proof, could only be furnished by defendant. By another clause, plaintiff was bound to bring suit within one year from the death of the insured. This last clause of the contract has no superiority or ruling force over other provisions. They must all be considered together. If plaintiff could not bring his action until proofs of death were furnished defendant, and defendant prevented him from furnishing such proofs, then, clearly, a failure to

bring the action within one year was occasioned by defendant's fault rather than plaintiff's, and such failure cannot be urged by defendant to defeat plaintiff's cause of action.

Defendant attaches much importance to the phrase in this limitation clause to the effect, "without reference to the time of furnishing the proofs of death." These words do not deny the conclusion reached. They refer only to the time when the proofs are furnished, and not to a total absence of proofs, as we have in this case. The general principles here involved are fully covered by Case v. Insurance Co., 83 Cal. 473, 8 L. R. A. 48, 23 Pac. 534. For the foregoing reasons the judgment and order are affirmed.

We concur: Van Dyke, J.; Harrison, J.

## DE GREAYER v. FIDELITY AND CASUALTY COMPANY OF NEW YORK.

S. F. No. 1417; September 15, 1899.

58 Pac. 390.

**Insurance — Voluntary Exposure — Evidence.**— Deceased was overtaken by a policeman while driving, and, in an altercation which ensued, the policeman shot and killed him. After deceased was shot, he fired his pistol at the policeman, but there was no positive evidence that he took the pistol from his pocket until he was shot. His pistol had a white handle, and one witness testified that before the shooting he saw deceased take something from his pocket and threaten to kill the policeman, while another testified that deceased went toward the policeman, unbuttoning his overcoat with his left hand, and that he raised his right when close to him, saying, "You will not stop my horse," and had nothing in his hand that witness could see; that after deceased was shot, and had fired at the policeman, witness saw something white in his hand. Held, that it was not an abuse of the trial court's discretion to refuse to set aside a verdict finding that deceased had not voluntarily exposed himself to unnecessary danger, within the exception of a policy.[1]

**Insurance—Voluntary Exposure to Danger.**—In an Action on a Policy excepting from its operation death by voluntary exposure

[1] Cited in the note in 139 Am. St. Rep. 702, on voluntary exposure to danger in accident insurance cases.

to unnecessary danger, an instruction that whether the assured so exposed himself did not depend on his having exercised reasonable care or caution, or that he had been guilty of negligence or unlawful acts, but whether he voluntarily exposed himself to unnecessary danger, and death resulted in consequence thereof, is not erroneous, as misleading or confusing.

APPEAL from Superior Court, City and County of San Francisco.

Action by Harry G. De Greayer, by Septimus De Greayer, his guardian, against the Fidelity and Casualty Company of New York. From a judgment in favor of plaintiff and from an order denying a new trial defendant appeals. Affirmed.

S. C. Pardee for appellant; Parker & Eells and A. G. Eells for respondent.

HAYNES, C.—The plaintiff brought suit by his guardian to recover from the defendant $5,000 the principal sum of a policy of insurance against death from bodily injuries sustained through external, violent and accidental means, issued to one Harry De Greayer, in which the plaintiff was named as the beneficiary. Said policy contained the exception that it did not cover "voluntary exposure to unnecessary danger," and the defendant pleaded and relied upon that exception as a defense to the action. A jury trial was had, and a verdict returned for the plaintiff. From the judgment entered thereon and from an order denying a new trial the defendant appeals.

1. Appellant's principal contention is that the evidence does not justify the verdict. The general rule that where the evidence is conflicting the verdict will not be disturbed, is conceded, but it is contended that there is no conflict in the evidence. It is true that all the witnesses called to testify to the circumstances under which De Greayer was killed were called by the defendant, but that fact is not conclusive upon the question of conflict. Many a case has been lost because of differences between a party's own witnesses. Here, however, the defense was based upon an exception in the policy, and the burden of proof was upon the defendant. Under the general provisions of the policy, the defendant's liability is conceded, and it could be relieved from liability only by establishing its special defense by satisfactory evidence—that

evidence which ordinarily produces moral certainty or conviction in an unprejudiced mind: Code Civ. Proc., sec. 1835.

De Greayer died from the effect of a pistol shot at the hands of a mounted park policeman named Harper. The homicide occurred about 5 o'clock in the afternoon of January 30, 1892. De Greayer, accompanied by a lady, had been driving in the park, and at the hour named left the main driveway, and was going to the north exit, near the terminus of the car lines, and about opposite Dickey's saloon. Two witnesses were called by the defendant, who witnessed the shooting. One (Rev. O. C. Miller) testified: That he had been walking with his wife in the park, and was also near said north exit, when he heard the swift gallop of the policeman's horse to overtake the buggy driven by De Greayer, and saw him overtake it and seize De Greayer's lines near the bridle and stop his horse. That De Greayer jumped out of his buggy, and, as he was passing round his horse toward the policeman, he "threw up his hand this way [the witness put his hand to his breast]—as I would suppose, to unbutton his coat. Then he went closer to the policeman, and I saw him raise his hand up this way [showing], and he said, 'You will not stop my horse,' and then there was a flash of a pistol, and that flash was down toward the vest of the gentleman, and the gentleman fell or sunk down to the ground, on one knee." That the lady screamed, and the horse turned and ran with the buggy back into the park, and the policeman turned and pursued the horse and buggy, and as he pursued it the gentleman fired one or two shots at the policemtn. That, when the gentleman got out of his buggy and stepped toward the policeman, he had nothing in his hand that he (the witness) could see. That while he was unbuttoning his overcoat with his left hand his right hand went up "this way" (showing). That his manner was excited and threatening. The witness was asked whether he saw anything in De Greayer's hand when he shot at the policeman as he pursued the runaway horse, and he replied: "It was getting toward dark, and I only saw something white. It might have been his cuff. I cannot say as to that." Upon cross-examination this witness drew a diagram upon the blackboard showing the roads and the relative position of himself and the other parties at the time of the shooting; but, as the dia-

gram is not reproduced in the record, we are not aided by it, however much it may have aided the court and jury in understanding and weighing, not only his testimony, but that of the other witness who was called by the defendant to testify to the same circumstances. It does appear from his testimony, however, that the shooting occurred in the park somewhere between the main driveway and the exit, and that this witness could not have been far from the point where it occurred. Alexander McCord, the other witness to the shooting, was at the time on the platform of Dickey's saloon, nearly opposite the exit from the park, and the full width of the street—eighty feet—from it. He testified in chief as follows: "He [De Greayer] jumped out of his buggy, and when he got halfway from his horse he unbuttoned his coat. He had a long ulster on, and he pulled his coat open and put his hand back in his pocket here [showing], and pulled something out. I then thought it was a pocket handkerchief. It was something white. And he made the remark, 'Damn you! I will kill you.' He went right up to the policeman. The policeman's horse backed from him—I don't know whether the policeman pulled his horse away—and he put his hand up to him like that. [The witness raised his right arm.] Then I heard two reports; a pistol go off twice—what I supposed was a pistol go off twice; and as the pistol went off the woman screamed, and the horse turned around and went back into the park. The policeman turned quickly and rode right after her and the buggy, and as he did so De Greayer went down on his hands and knees, and as he got up he pulled his pistol out and fired, I think twice, after him, and that is all I saw, and then I left." Upon cross-examination he admitted that he did not testify upon the examination of Harper before the police magistrate that De Greayer said, "I will kill you," but explained that he was not asked to make a statement, but was only asked questions; that De Greayer might have said, "I will not let you stop my horse," but that would not make any impression on his mind; that, at the time the policeman fired, "De Greayer was right up close to the policeman when the first shot took place—maybe two inches, or maybe four, but very close to him. He was right beside of his horse." It was shown that De Greayer had a white-handled pistol, and that one chamber had been discharged. There was evidence tending to prove that De

Greayer was not in the habit of carrying a pistol; that a short time before he was out driving, and saw a horse badly injured in a runaway, and no one had anything to kill him with; that he was a member of the society for the prevention of cruelty to animals, and carried a pistol for the purpose above indicated. Septimus De Greayer testified that deceased carried his time-book and his pocket handkerchief in his hip pocket, and invariably carried cards in his hip pocket.

The point of the controversy upon the evidence was whether De Greayer assaulted the policeman with his pistol. Upon this question there was no positive evidence that he took the pistol out of his pocket until after he was shot, when, according to the testimony of McCord, De Greayer, when he was shot, went down on his hands and knees, "and as he got up he pulled his pistol out and fired, I think twice, after him." True, he afterward said that as De Greayer passed around the head of his horse when he saw his hand in his pocket, and when he could see the white object, that he could not tell then whether the white object was a pocket handkerchief or a pistol, but it was not cards; it was too large for that, too much of it, and it did not look like cards. The facts were submitted to the jury under full and proper instructions, directing them to take into consideration all the facts and circumstances of the case, and whether the deceased did or did not, at the time he approached the policeman, exhibit or have in his hands a pistol. The jury saw and heard the witnesses, and knew better than we possibly can the weight that should be given to their evidence. There was not only a direct conflict in their evidence as to what De Greayer said, but Miller, who was much nearer, saw nothing in De Greayer's hand until after he was shot, while McCord says De Greayer, "as he got up, pulled out his pistol and fired." We think the jury were justified in failing to find that De Greayer assaulted the policeman with a pistol, and thereby voluntarily exposed himself to unnecessary danger, within the meaning of the exception in the policy, the burden being upon the defendant to prove that fact affirmatively. The learned judge before whom the cause was tried has a much larger discretion in setting aside verdicts than is given to appellate courts, and the real question in this court is whether he abused his discretion in refusing a new trial upon the ground

above considered. A doubt on our part, even if entertained, would not justify a reversal.

2. The only other question noticed in appellant's brief is an exception to the following instruction, given to the jury at plaintiff's request: "The question of whether the circumstances of a particular accident bring it within one of the exceptions by which the company has guarded itself against an accident resulting from voluntary exposure to unnecessary danger is not a question whether the person insured has exercised reasonable care or caution, nor whether he has been guilty of negligence or of unlawful acts, but it is a question whether or not the insurance company has shown—the burden being upon it to do so—that the insured voluntarily exposed himself to unnecessary danger, and that the death resulted in consequence thereof." I see no error in this instruction. It is said by counsel for appellant that it is misleading and confusing; that, while it is true that "voluntary exposure to unnecessary danger is more than negligence," yet the decisions do not hold that it is not negligence. Counsel refutes his own criticism of this instruction when he says that "voluntary exposure to unnecessary danger is more than negligence." In other instructions, to which no objection is urged, the court fully and clearly informed the jury what the words "voluntary exposure to unnecessary danger," as used in the policy, mean. I advise that the judgment and order appealed from be affirmed.

We concur: Chipman, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

## PEOPLE v. MATTHEWS.

Cr. No. 525; September 16, 1899.

58 Pac. 371.

**Homicide.—The Admission of Evidence not Affecting Substantial Rights** of defendant and not prejudicial to the merits of his defense is not ground for reversal.

**Homicide—Sobriety of Accused.—Evidence Showing** that at the time of the murder defendant was sober is not prejudicial to defendant, where he and others have testified to the same effect.

**Homicide.—An Instruction is Properly Refused Which** is based upon a state of facts of which there is no evidence.

**Homicide.—Testimony to the Effect That Witness,** on the night of the homicide, passed a young man on the road; that afterward she heard a wagon coming rapidly up behind, and soon after the sound ceased, and she heard a pistol shot; that she passed the place next morning, and saw a pool of blood; and that she had recognized a body at the morgue as the body of the young man she had passed on the road, is material, and properly admitted.

**Homicide—Resisting Arrest.—Where the Defense to Homicide** is that defendant, a constable, was attempting to arrest deceased, an instruction, "If the jury believe that defendant, when he fired the fatal shot, was lawfully attempting to arrest deceased, and intended to shoot over his head, they will find defendant not guilty," was properly modified to read, "If the jury believe that defendant had reasonable cause to believe, and did believe, that the deceased had committed a felony, and was attempting to arrest deceased, and fired the fatal shot intending to shoot over the defendant's head."

**Homicide—Resisting Arrest.—An Instruction That,** "if the jury had any doubt about the lawfulness of the means adopted by defendant to arrest deceased, they should acquit defendant," is properly refused, as being indefinite.

APPEAL from Superior Court, Santa Clara County.

John A. Matthews was convicted of murder and appeals. Affirmed.

D. W. Burchard and C. L. Witten for appellant; Attorney General Ford for the people.

COOPER, C.—The defendant was charged with the crime of murder, alleged to have been committed in the felonious

killing of one Heinrich Hopken on the twenty-eighth day of June, 1898. It appears that defendant was, at the time of the homicide, a constable of Milpitas township, in Santa Clara county. He had been in and around the saloon of one Pancera nearly all the afternoon, and had been drinking. About 8 o'clock or later in the evening defendant was engaged in playing cards with one McCarron and others in the saloon, when Pancera came in and informed the parties in the saloon that if any of them had any articles in their vehicles outside that they did not want stolen they had better go out and see about them. Defendant and McCarron immediately went out to where defendant's horse, attached to a light spring wagon, was tied to a hitching-post. Defendant looked into his wagon, and informed McCarron that his whip was missing. The defendant immediately unhitched his horse, got into his wagon, and, with McCarron, started south on the Berryessa road, and after the two had gone about a hundred yards the defendant claimed that he had discovered that his coat was also missing from the wagon. After driving rapidly along the road until they had passed Fourteenth street they overtook deceased, who was walking along the south side of the road, and, as the horse was traveling rapidly, they passed him some ten or twelve feet, and stopped. No coat or whip was seen in the possession of deceased other than the coat he was wearing, which was not claimed to be the coat of defendant. When defendant came to within five or six feet of deceased, he addressed him, in substance, "What did you do with that whip?" The deceased said he did not have any whip, and turned and ran; whereupon defendant took out his pistol, and immediately fired, and deceased fell to the ground, some ten or twelve steps from defendant. The defendant and McCarron immediately went up to deceased, and he was lying on his back, with blood on his face, dead. The jury, by its verdict, found the defendant guilty of manslaughter, and the court sentenced him to a term of five years in San Quentin. He made a motion for a new trial, which was denied, and this appeal is from the judgment and order. The case comes here on a bill of exceptions and the judgment-roll.

1. There was no error in admitting the evidence of the witness Cothran. The witness testified that on the evening of the homicide he saw deceased at the house of his brother, E. E. Cothran, 229 Ninth street, and that deceased left about

half-past 9 o'clock; that he saw the dead body the next morning; and that deceased was between seventeen and eighteen years of age. There was nothing in the testimony of the witness that could in any way have been prejudicial to defendant. The admission of evidence not affecting the substantial rights of a defendant, and not appearing by the record to have been prejudicial to the merits of his defense, is no ground for the reversal of a judgment: People v. Clark, 106 Cal. 32, 39 Pac. 53.

2. The witness Jones was allowed, under defendant's objection, to testify that defendant was at the saloon of witness on the morning of June 28th; that he took probably three or four drinks, but was at no time intoxicated, and left about 1 o'clock in the afternoon. While this testimony does not appear to have much to do with the issue, it could not have prejudiced the defendant. He testified in his own behalf that he was perfectly sober, and his counsel proved by McCarron, on his cross-examination, that defendant was not under the influence of liquor at the time of the homicide.

3. In the instructions of the court to the jury it was said, in effect, that a peace officer cannot legally arrest any person for petit larceny without a warrant, when the larceny was not committed in the presence of such officer; and the court refused the thirty-third instruction asked by defendant, to the effect that a peace officer may, without a warrant, arrest a person for a public offense committed in his presence. We think the instruction given by the court stated the law correctly (Pen. Code, sec. 836; People v. Johnson, 86 Mich. 175, 24 Am. St. Rep. 116, 13 L. R. A. 163, 48 N. W. 870); and the defendant's requested instruction was properly refused, because there was no evidence that any offense had been committed in the presence of the defendant.

4. The witness Mrs. Thompson was allowed, after objection of defendant's counsel, to testify that, on the night of the homicide, she was on the way home from San Jose, with her husband and sister; that, after 9 o'clock, they passed a young man on the Berryessa road, walking leisurely along smoking a cigar, and that he had no coat or whip, except the coat he was wearing; that, after they passed the young man, they heard a horse and wagon coming up behind them rapidly, and after they had gone some twenty or thirty rods there was a cessation of the sound of the horse and wagon, and they

heard a pistol shot; that she passed the place next morning, and saw a pool of blood by the road; and that she saw the body of the boy at the morgue, and recognized it as the body of the young man she had passed in the road. This testimony was material, and was properly admitted.

5. It is said that the court erred in refusing defendant's requested instructions numbered 12, 13, 19, 24, 26 and 35. Counsel have not seen fit, in their brief, to give us the benefit of their reasons as to why the refusal to give the instructions, or either of them, was error; but we have examined them, and we discover no prejudicial error in the refusal to give any of them. The twelfth, while stating a correct proposition of law, was covered fully by other instructions. The thirteenth, as requested, was as follows: "If the jury believe that the defendant, when he fired the fatal shot, was lawfully attempting to arrest deceased, and intended to shoot over the head of deceased, and that such act on the part of defendant was a necessary and proper one for the purpose of inducing the deceased to stop, then they will find the defendant not guilty." While the court refused it as requested, it was given as modified, as follows: "If the jury believe that the defendant had reasonable cause to believe, and did believe, that the deceased had committed a felony, and was attempting to arrest deceased, and fired the fatal shot intending to shoot over the head of deceased, and that in so shooting the defendant did so for the purpose of inducing the deceased to stop, then if you find that such act on the part of defendant was necessary for the purpose of effecting such arrest, then you will find the defendant not guilty." The modification was proper, and was certainly as favorable to defendant as he could expect, or as the law would warrant. The nineteenth request was that if the jury had any doubt about the lawfulness of the means adopted by defendant to arrest the deceased they should acquit the defendant. This instruction was too indefinite in the form in which it was tendered, and would only have tended to confuse the jury. Elsewhere in the charge the jury are told that the prosecution must prove every fact and circumstance necessary to a conviction beyond a reasonable doubt, or they cannot convict the defendant. The twenty-fourth and twenty-sixth requests were fully covered by other instructions given by the court. The thirty-fifth instruction, as requested, was prop-

erly refused. It not only states an incorrect proposition of law, but it was properly refused, because there was no evidence in the record upon which it could apply. The court very fully and ably stated the law as applied to the evidence in its charge to the jury, and in every part of the charge the rights of defendant were carefully guarded. We advise that the judgment and order be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## McCLATCHY et al. v. SPERRY et al.

S. F. No. 2078; October 5, 1899.

56 Pac. 529.

**Appeal.—The Supreme Court may Order a Stay of Proceedings on a judgment appealed from on the filing of a sufficient bond for the protection of the respondent.**

APPEAL from Superior Court, Sacramento County.

Action by McClatchy & Co. against Sperry & Hutchinson. From a judgment for plaintiffs, defendants appeal. Application for leave to file a stay bond. Granted.

H. G. W. Dinkelspiel for appellants; L. T. Hatfield for respondents.

PER CURIAM.—In this case exception was taken to the sureties on the stay bond filed by appellants at the time the appeal was taken. There was a failure to justify the sureties within the time allowed by law, and we think such failure is hardly excused by the showing now made in support of the application for leave to file a stay bond here and for a supersedeas. But the respondents do not object to the supersedeas, provided they can be secured by a bond filed in this court, and at this time. It is well settled that we can order a stay upon the filing of a sufficient bond in this court. Hill

v. Finnigan, 54 Cal. 493, established the practice, and it has been followed in numerous subsequent cases. Of course, it is necessarily implied that a bond so filed will protect the respondent. The bond tendered by the appellants will be approved and filed, subject to any exceptions that the respondent may take within ten days after notice of this order. In the meantime, and until the further order of the court, all proceedings upon the judgment appealed from are stayed.

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## PEOPLE v. WOODRUFF.

Cr. No. 516; October 21, 1899.

58 Pac. 854.

**Embezzlement—New Trial—Identity of Defendant.**—Defendant was convicted of embezzlement, his identity being established by four witnesses, three of whom testified that he had a beard of about two weeks' growth at the time of the crime. Defendant asked a new trial, based on newly discovered evidence, tending to show that he had no beard, and filed several affidavits. In one of these affiant stated that another told him before the trial that he had committed the crime. Affiant did not make this alleged fact known until after defendant's conviction. This affidavit also seriously contradicted statements made upon defendant's preliminary examination. Held, that the affidavits contained nothing which rendered it probable that on a retrial of the case a different result would be reached.

APPEAL from Superior Court, Los Angeles County.

John Woodruff was convicted of embezzlement, and appeals from the judgment and an order denying his motion for a new trial. Affirmed.

J. N. Phillips and W. H. Shinn for appellant; Attorney General Ford for the people.

HAYNES, C.—John Woodruff was convicted of the crime of embezzlement, and appeals from the judgment and an order denying his motion for a new trial. The only ground presented for reversal is that the court erred in overruling his

said motion. The controverted question is the identity of the embezzler. Fetterman & Son were the proprietors of a livery-stable at Long Beach. On July 8, 1897, the senior partner was absent, and the son and his younger brother, a boy of fifteen, were in charge of the stable. A man, who was not known to either of them, called, and hired a pair of horses and a spring wagon to go to Redondo. The elder brother harnessed the horses and the younger brother, assisted by the stranger, greased the wagon. These things consumed about twenty minutes, and the stranger drove away, going, not to Redondo, but to Los Angeles, where he and another man disposed of the horses, wagon and harness. No inquiry was made by the livery-keeper as to the name or residence of the hirer. The defendant was arrested on the 3d of September, at Long Beach, the defendant's brother, Charles, being with him. The elder of the Fetterman boys testified on cross-examination that the man who got the team had at least two weeks' growth of beard on his face at the time he got the team, and the next time he saw him he was clean shaven, except that he had a mustache. The witness, however, further testified that he identified him by his eyes, his face, and general appearance, as well as his whiskers; that he was as positive as he could be of anything that defendant is the man who got the team. The younger brother testified that he was positive—had no doubt—that defendant was the man who got the team. He also testified upon cross-examination that the man had long whiskers, "had quite a whisker on his face"; that when he saw him after his arrest he knew he was the man that took the team; that on that occasion he picked him out of a crowd. J. M. Brown testified that he had known the defendant for two years, and saw him the day before he got the team at Long Beach, and talked with him; that he had a beard all over his face; that it was not long, but he had not shaven for some time. At the time the property was disposed of there was another man with the defendant, and they traded the spring wagon to Peter Varlo for a buggy, and Varlo identified the defendant positively as one of the men, and thought Charles Woodruff was the other. There were two men also at Meinhardt's horse market, where the remainder of the property was disposed of, one of whom was identified as the defendant. The defendant offered evidence tending to prove an alibi, and also that he did not wear whiskers or a full

beard, and that his brother shaved him on the 4th of July, at his father's house. Six witnesses testified to the fact that defendant wore a mustache, but no whiskers.

One of the grounds for a new trial, and the only one discussed, is that of newly discovered evidence. The trial was concluded on January 12, 1898. Six affidavits, besides those of the defendant, containing a statement of newly discovered evidence, were filed, and used in support of defendant's motion for a new trial. Except as hereafter noticed, these affidavits contained matters which were merely cumulative of the evidence touching the existence or absence of a beard. The only new fact in the affidavit of Janie Flint was to the effect that on the evening of July 9th Samuel Woodruff told her that he had been down to Long Beach, and had driven up from there to Los Angeles. She was examined as a witness for the defendant, and, judging from her interest in the defendant's case manifested in her testimony, it is remarkable that she should have failed to communicate this alleged fact to him or his counsel. The affidavit of Walter S. Humbert was to the effect that he was acquainted with both John and Samuel Woodruff prior to July, 1897; that on July 8th, about 5 o'clock P. M., he saw Samuel on Los Angeles street, near Third, driving a span of horses, one gray and one sorrel; that the team appeared tired and dusty, and that the defendant was not with him, and that he did not see them together that day; that he did not know of the arrest and trial of defendant until after his conviction, when he learned of it through the newspapers. Here we have a man passing along a busy street in the heart of a city of one hundred thousand inhabitants, with nothing to specially call his attention to the circumstance, who seven months afterward can describe the team and wagon driven by a man whom he has known a few months, and, more wonderful still, is willing to swear positively that it was on the eighth day of July, about 5 o'clock in the afternoon. The affidavit of Charles A. Woodruff was to the effect that on January 3, 1898 (about eight days before the trial began), Samuel Woodruff told him it was he, and not the defendant, who took the team from Fetterman's stable, and that defendant was innocent, and that he (affiant) did not tell anybody of said conversation until after defendant's conviction. If said deponent believed said statement alleged to have been made by Samuel Woodruff, and failed to

communicate it to the defendant, but remained silent, and permitted an innocent man to be convicted and the guilty man to escape, he is wholly unworthy of credit. Whether Samuel resembled his brother, the defendant, and wore a beard or not, could not well overcome the testimony of the defendant given upon his preliminary examination to the effect that on the morning of the 10th of July a man named Williams requested him to aid in selling the property, and that he did so, coupled with the fact that the day before he and another man were twice at Varlo's place, and there traded the wagon for a buggy, and was positively identified by Varlo as one of the two men. I see nothing in the affidavits that would render it probable that on a retrial of the case a different result would be reached: People v. Urquidas, 96 Cal. 240, 31 Pac. 52.

I advise that the judgment and order appealed from be affirmed.

We concur: Cooper, C.; Gray, C.

PER CURIAM.—For the reason given in the foregoing opinion the judgment and order appealed from are affirmed.

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## PEOPLE ex rel. FOGG v. PERRIS IRRIGATION DISTRICT (HUTCHINGS et al., Interveners).*

L. A. No. 743; October 30, 1899.

58 Pac. 907.

**Appeal—Merits.—Motion to Dismiss Appeal on the Ground that appellants have no interest will not be sustained.**

APPEAL from Superior Court, Riverside County.

Quo warranto by the people, on the relation of one Fogg, against the Perris Irrigation District (one Hutchings and others, interveners). There was a judgment for plaintiffs and interveners appeal. Motion to dismiss appeal denied.

C. C. Wright, Wm. C. Cox and L. L. Boone for appellants; W. F. Fitzgerald, Attorney General Ford and Works & Lee for respondents.

*For subsequent opinion, see 132 Cal. 289, 64 Pac. 399, 773.

PER CURIAM.—This is a proceeding by quo warranto to determine the de jure existence of a de facto irrigation district. Certain bondholders of the district were allowed to intervene against the people, and have appealed from a judgment declaring the organization illegal. The people now move to dismiss the appeal upon the ground that the interveners have no interest, there being no judgment against them. The motion involves the whole merits of the case as presented on the part of the appellants by their intervention in the superior court and by their appeal. Want of merit in an appeal is not a ground for dismissing it. Motion denied.

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## BLAIR v. SQUIRE et al.

S. F. No. 1132; November 22, 1899.

59 Pac. 211.

**Appeal—Finding Supported by Substantial Evidence.**—The supreme court will not disturb a finding of fact made by a trial court, if there is any substantial evidence to support it.

**Deed—Presumption as to Consideration.**—Under Code of Civil Procedure, sections 1614, 1963, subdivision 39, providing that a written instrument is presumptive evidence of a consideration, the introduction of a deed in evidence places the burden of showing want of consideration on the party alleging it, and carries with it a presumption that it was given for a valuable consideration.

**Mortgage—Deed Absolute.—Defendant's Mother Owed Her,** and defendant was surety for her mother for more than the value of the mother's interest in land conveyed to defendant by absolute deed, in consideration of full satisfaction of the mother's indebtedness. Defendant took possession of the land, collected rents and paid interest on other liens assumed by her. She did not surrender her mother's notes, but did not keep them with any idea of collecting them, and at the time of the execution of the deed, defendant took a continuing mortgage from her mother on the land in renewal of a previous mortgage for the same amount, to preserve her priority over other liens. Held, that the evidence was sufficient to support a finding that the deed was an absolute conveyance, and not a mortgage.

APPEAL from Superior Court, Alameda County.

Partition by Florence Ethel Blair against Mabel E. Squire and others. From a decree in favor of plaintiff, and from an

order denying a motion for a new trial, the San Francisco Tool Company, one of the defendants, appeals. Affirmed.

Pringle & Pringle for appellant; Samuel B. McKee and Fitzgerald & Abbott for respondent.

COOPER, C.—This is an appeal by the San Francisco Tool Company from an interlocutory judgment and decree and from an order denying its motion for a new trial. The action was brought by the plaintiff for the partition of a tract of land of about two hundred and fifty-six acres, situate in the county of Alameda. The title was originally in one Walter Blair, who died intestate leaving surviving him, as his only heirs, his widow, Phebe A. Blair, and two daughters, Florence Ethel Blair, the plaintiff, and Mabel E. Squire, one of the defendants. On the twenty-third day of August, 1894, the superior court of Alameda county, by proper decree of distribution in the matter of the estate of said Walter Blair, distributed the said real estate to said widow and daughters herein named, in the proportions to which they were entitled under the law. No question is made as to the validity of the said decree of distribution, and there is no conflict between the mother and daughters, and no objection by either of them, to the decree of distribution or to the interlocutory decree and judgment herein entered. The appeal has, in pursuance of a stipulation filed in this court, been dismissed as to the plaintiff, and the decree was satisfactory to all the defendants except the San Francisco Tool Company, which is the appellant herein. The appellant does not question the correctness of the decree as to the plaintiff, nor as to any of the defendants except as to the defendant Mabel E. Squire. For convenience, the San Francisco Tool Company will in this opinion be called the appellant, and the defendant Mabel E. Squire the respondent, as they are the only parties contending here and the parties to be affected by the judgment of this court.

On the twenty-third day of August, 1894, Phebe A. Blair, by grant, bargain and sale deed, duly executed and delivered, sold and conveyed all her interest in said tract of land to respondent, which deed was duly recorded in the recorder's office of Alameda county. After this deed was delivered and recorded, and in the month of September, 1894, the appellant brought suit against Phebe A. Blair upon an indebtedness due

from her to said appellant. A writ of attachment was duly issued against said Phebe A. Blair, and levied upon all her right, title and interest in and to said real estate. The appellant in its answer herein did not deny the due execution, delivery and recording of the said deed to respondent, but alleged, upon information and belief, that the said deed was intended only as a mortgage to secure respondent for certain advances made by her to her mother, and certain indorsements and obligations made by respondent on behalf of, and for the benefit of, her mother, Phebe A. Blair. The real issue, and the only issue in the court below was as to whether the deed to respondent was in fact a deed or a mortgage. Phebe A. Blair was made a defendant but did not appear after being served with summons, and her default was duly entered. The case was tried in the court below without a jury, and the court found that the deed "was not given by way of mortgage or security, but was and is an absolute conveyance, as hereinbefore found." The appellant claims that the said finding is not supported by the evidence, and, although the printed record contains eight hundred and sixty-two folios, this is the sole and only point to be determined here. We have carefully examined the record, and we think the evidence supports the finding. The learned judge of the lower court having seen and heard the witnesses and found the fact, under the elementary rule we cannot disturb the finding if there is any substantial evidence to support it.

The respondent introduced in evidence the deed made by Phebe A. Blair to her. This was presumptive evidence of a valuable consideration: Code Civ. Proc., secs. 1614, 1963, subd. 39; Rogers v. Schulenburg, 111 Cal. 284, 43 Pac. 899. The burden of showing a want of consideration was then cast upon appellant, who was seeking to invalidate the deed as an absolute conveyance: Civ. Code, sec. 1615; Rogers v. Schulenburg, supra. The rule is well settled that evidence to show that a deed absolute on its face is in fact a mortgage must be clear, unequivocal and convincing: Mahoney v. Bostwick, 96 Cal. 58, 31 Am. St. Rep. 175, 30 Pac. 1020; Ganceart v. Henry, 98 Cal. 284, 33 Pac. 92; Cadman v. Peter, 118 U. S. 73, 30 L. Ed. 78, 6 Sup. Ct. Rep. 957.

The appellant called the respondent as a witness in its behalf, and she testified that at the time of the execution of the deed the amount due her from her mother, and the amount

of her mother's indebtedness for which she had become and was responsible, was about $108,000; that this was more than the value of her mother's interest in the land; that the deed was intended as an absolute conveyance, and not as a mortgage, and was in full satisfaction of all indebtedness due her from her mother, and of all obligations for which she had become responsible; that after the execution of the deed she has ever since held possession of the property, collected the rents and paid interest on all obligations so due by her mother; that she assumed and agreed to pay the debts of her mother which were a lien upon the property. This testimony is not contradicted, and is the only evidence offered by appellant to show that the deed was in fact intended as a mortgage. It amply sustains the finding. It certainly is not clear and convincing that the deed was given as security for a continuing indebtedness. It is said that respondent did not deliver up the notes to her mother, and that she at the same time took a continuing mortgage from her mother for some $5,117. The respondent explained keeping the notes. She said that she did not know why they were kept; that her mother did not ask her for them; and that she did not keep them with any idea of collecting them. The $5,117 mortgage was for money actually loaned by respondent to her mother, and she held a prior mortgage to secure it. She explained that to preserve this priority, and as a safeguard, the mortgage was renewed and kept alive separate from her ownership in the land. This the respondent had the right to do. She was not compelled to surrender and cancel a prior lien upon the land deeded to her because by the deed she took the legal title. At most, the circumstances could only tend to throw suspicion upon the good faith of the parties to the deed. They would not here be held sufficient to overthrow a finding based upon, and supported by, uncontradicted evidence in the record. The judgment and order should be affirmed.

We concur: Chipman, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## HILLMAN v. GRIFFIN.*

Sac. No. 342; November 27, 1899.

59 Pac. 194.

**Attachment—Collateral Attack.—Evidence to Impeach an Affidavit** of attachment is not admissible in a collateral proceeding by a stranger to the attachment suit to recover possession of the property.[1]

**Appeal.—Where There is a Substantial Conflict** in the evidence, the finding of the trial court will not be disturbed.

**Replevin.—Defendant Seized in Attachment Certain Stock** which plaintiff claimed to have purchased from the defendant in attachment. Plaintiff's statement that he purchased the stock and had been in continued possession for some years prior to the attachment was uncontradicted. Held, he was entitled to recover such stock, although it happened to be, at the time of the levy of attachment, on the ranch of defendant in attachment.

APPEAL from Superior Court, Sacramento County.

Action by A. C. Hillman against C. W. Griffin. Judgment for defendant. Plaintiff appeals. Reversed.

Robert T. and William H. Devlin and F. E. Baker for appellant; C. W. Thomas for respondent.

VAN DYKE, J.—This action is in the nature of replevin. The plaintiff claims the property through purchase from Mrs. Emma H. Briggs, owner of the Glorietta Vineyard ranch in Yolo county. It consists of a large quantity of boxes and trays used on a fruit ranch, together with the tools and implements of various kinds necessary for the cultivation of such ranch, all embraced in the bill of sale dated the 12th of January, 1895, for the consideration, as stated by the plaintiff, of $6,000; also two mules and one mare, of the value of $500, not embraced in said bill of sale but purchased by the plaintiff from the said Mrs. Briggs in 1893. The defendant justifies the taking of the property in question as sheriff of Yolo county under proceedings in attachment in the suit of the

*For opinion on rehearing, see post, p. 358, 59 Pac. 696.

[1] Cited in the note in 123 Am. St. Rep. 1045, on proceedings to dissolve attachments.

West Valley Lumber Company, a corporation, against said Emma H. Briggs. The property, at the time of the seizure and taking by the defendant as sheriff, was on the said Glorietta Vineyard ranch. The affidavit in the attachment proceedings states that the action is brought upon a certain promissory note for the principal sum of $3,160, dated June 30, 1893, due eight months after date, with interest at the rate of ten per cent per annum from date until paid; "that the same has been and is secured by a mortgage on real property, as appears of record in the records of Yolo county, California, in book 37, at page 626; that since the making and delivery of said mortgage, without any act of plaintiff, such security has become and is valueless." The defendant in said action, Mrs. Emma H. Briggs, appeared in the action, but raised no objection to the attachment proceedings. In rebuttal the plaintiff offered to prove the value of the Glorietta Vineyard ranch, the property covered by the mortgage to the West Valley Lumber Company, and that it had not decreased but had increased in value, and was worth more than the prior encumbrance thereon, and had not become valueless since the mortgage to the said West Valley Lumber Company, as stated in said affidavit. The court sustained an objection to this offered testimony, and this ruling of the court is assigned as one of the errors on the part of plaintiff, and pressed with considerable vigor. The plaintiff was not a party to the attachment suit, and the offered testimony is in the nature of a collateral attack by a stranger to the proceeding. In Shea v. Johnson, 101 Cal. 457, 35 Pac. 1023, the contest was between a junior and prior attachment, and it was sought, as in this case, to attack the prior attachment collaterally, and the court said: "The general rule is that, where the claim of the prior attaching creditor is for a bona fide debt without tinge of fraud, such an objection to the attachment proceedings as that insisted on in the case at bar can be successfully made only by the defendant in the attachment suit"; citing Fridenberg v. Pierson, 18 Cal. 152, 79 Am. Dec. 162; Patrick v. Montader, 13 Cal. 435; Harvey v. Foster, 64 Cal. 296, 30 Pac. 849; Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609; Drake on Attachments, sec. 771. In Scrivener v. Dietz, referred to, as in this case, it was sought to impeach the affidavit in the attachment proceeding, and the court say: "Admittedly,

this irregularity in the affidavit constituted good ground for a motion by the attachment debtor to dissolve the attachment; and, if such a motion had been made by him to the court in which the action was pending, it would have been the duty of the court to have dissolved the attachment. . . . . But neither the regularity of the affidavit nor the validity of the attachment issued upon it was questioned by the debtor. He therefore waived whatever irregularities existed in either, and as against him, at least, the attachment was valid and operative; so that its execution according to law operated to create a provisional lien upon the property on which it was levied in favor of the attaching creditors. . . . . The attachment proceedings are not attackable collaterally for an infirmity in the affidavit"; citing authorities. "Notwithstanding the infirmity, the judgment was not void; it was only voidable at the instance of the attachment defendant, and could not be assailed collaterally by a stranger." The court below, therefore, in excluding the offered testimony, is sustained by authority. The same rule holds in regard to plaintiff's objection to the undertaking in attachment. One of the issues tried in the action was as to the delivery of the property sold by Mrs. Briggs to the plaintiff, mentioned in the bill of sale, and on this issue the court finds as follows: "That on the —— day of January, 1895, the said Emma H. Briggs made, executed, and delivered to the plaintiff herein a bill of sale of the property herein, and that on the eighth day of February, 1895, at the date of the levy of said writ of attachment and the date of the taking and seizure of said property by the defendant herein, the said Emma H. Briggs had not delivered the possession of said property to the plaintiff herein; that at said date last aforesaid the property was in the possession of Emma H. Briggs; that the transfer of said personal property from said Emma H. Briggs to the plaintiff herein (she at the time having possession and control of said property) was not accompanied by immediate delivery, and was not followed by an actual and continued change of possession of the property so transferred, the property in question; that said transfer and bill of sale were fraudulent and void against the said West Valley Lumber Company, it being a creditor of said Emma H. Briggs while she was in the possession of said property." The most that can be said in favor of the contention of the plaintiff

that this finding is not supported by the evidence is that there was a substantial conflict in the evidence in reference to the delivery and continued change of possession of the property mentioned, and, that being the case, the finding must be allowed to stand. But, in addition to the property mentioned in the bill of sale, and referred to by the court in its finding, the sheriff seized at the same time, as already stated, two mules and one dark brown mare, of the value, as found by the court, of $500. The testimony of plaintiff shows that these two mules and mare were purchased at Davisville in 1893, and brought by him to the Glorietta vineyard, which is about ten miles from where they were purchased; and he testifies that they had been in his possession since their purchase in 1893, except for a short time, when he sold them to a Mr. Maxwell, who did not come up to the terms of sale, and returned them to the plaintiff. There is no evidence in the record in conflict with or contradicting the testimony of the plaintiff in this respect, and his testimony is corroborated by the bill of sale, which is set out in the record, and which does not contain these mules and mare, but does enumerate specifically all the other articles seized excepting them. The finding, therefore, that these articles had not been delivered at the time of sale, and that the possession had not continued in the plaintiff, is entirely unsupported by the evidence. They were purchased by the plaintiff, if not before the date of the note on which the attachment proceedings were had, at any rate long before the said note matured, and there is nothing to show that their sale and transfer was not founded upon a valuable consideration, and made in good faith; and the mere fact that they happened to be at the time of the seizure upon the Glorietta Vineyard ranch does not alter the case. Much other property might have been on that ranch, belonging to various parties entirely unconnected with Mrs. Briggs, at the time of the attachment proceedings. The judgment is reversed, and the superior court is directed to correct its findings according to the evidence at the trial as herein pointed out, so that it will appear therefrom that the above-named mules and horse were not the property of Emma H. Briggs at the time they were taken by the defendant, or subject to seizure on such writ of attachment then held by the defendant; and thereupon to enter judgment in accord-

ance with the findings as so modified and corrected. The order denying a new trial is affirmed.

We concur: Harrison, J.; Garoutte, J.

ON REHEARING.

December 28, 1899.

59 Pac. 696.

PER CURIAM.—On petition for a rehearing of this cause, it is ordered that a rehearing be denied, but the judgment of the department is hereby set aside, and the following judgment given in place thereof: The judgment and order of the superior court denying a new trial are reversed and the cause remanded.

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## REIS v. STATE.*

Sac. No. 525; November 28, 1899.

59 Pac. 298.

**State—Bonds—Liability—Appropriation.—Act of May 3, 1852** (Stats. 1852, p. 59), provided for the issuance of bonds to pay the expense of military expeditions, such bonds to be payable out of funds appropriated for that purpose by Congress, with the condition that, if such appropriation was insufficient, the bonds would be a valid claim against the state. Congress, in 1845 (10 Stat. 576), appropriated an unapportioned amount intended to pay the military expenses of the state incurred under the act of May 3, 1852, and under prior acts, but such appropriation, while sufficient to cover the expense under the act referred to, was insufficient to pay the entire indebtedness for which it was appropriated, and interest coupons on such bonds held by plaintiff were unpaid. Held, that, the liability of the state being conditioned on the failure of Congress to make an appropriation sufficient to pay the bonds issued under that act, such appropriation being sufficient for that purpose, the state was not liable, though the appropriation was insufficient to cover another and prior indebtedness not mentioned in the act.

APPEAL from Superior Court, Sacramento County.

Action by John O. Reis against the state of California. From a judgment for plaintiff the state appeals. Reversed.

*For subsequent opinion in bank, see 133 Cal. 593, 65 Pac. 1102.

Attorney General Ford for the state; J. D. Thornton and Freeman & Bates for respondent.

VAN DYKE, J.—This action is founded upon interest coupons detached from bonds issued under the act of May 3, 1852 (Stats. 1852, p. 59). The act is entitled "An act authorizing the treasurer of the state to issue bonds for the payment of the expenses of the Mariposa, Second El Dorado, Utah, Los Angeles, Clear Lake, Klamath and Trinity and Monterey expeditions against the Indians." The first section of the act reads as follows: "A sum not exceeding six hundred thousand dollars is hereby appropriated and set apart as an additional war fund, payable in ten years, out of any moneys which may be appropriated by Congress to defray the expenses incurred by the state of California, and interest thereon at the rate of seven per cent per annum, in the suppression of Indian hostilities, or out of the proceeds of the sale of any public lands which may be donated or set aside by Congress for that purpose; and should no such appropriation or donation be made, or if an amount sufficient should not be appropriated or donated within the said ten years, then the bonds authorized to be issued by this act shall be good and valid claims against the state, and shall be paid out of any moneys in the treasury not otherwise appropriated, to pay the expenses of the expeditions mentioned in this act." The bonds issued under this act were in denominations of $100, $250, $500 and $1,000 each, payable in ten years from the date of said act, with interest at the rate of seven per cent per annum, said interest being represented by coupons attached to said bonds, each coupon representing one year's interest. Said coupons were alike in general language, and differed only in number, amount and date of maturity. The coupons sued upon in this case were coupon No. 2, for $70, detached from bond 33, and coupons No. 3, for $70 each, detached from one hundred and eighty-one bonds, and coupons No. 4, for $70 each, detached from the same bonds, and coupons No. 5, for $46.66 each, detached from a like number of bonds; amounting, in the aggregate, to the sum of $39,902.12. The claims were presented to and rejected by the state board of examiners in November, 1894. Findings and judgment went for the plaintiff in the court below, except as to coupons No. 3, detached from bonds numbered 3, 10, 11,

12 and 13. In reference to these the court found in favor of the plea in bar, set up in the answer, of the judgment in the case of Sawyer v. Colgan, 102 Cal. 283, 36 Pac. 580, 834. One of the contentions on the part of the state on the appeal is that the state never became liable on the coupons in question, for the reason that within the time specified in the act in which the bonds were issued Congress did make an appropriation in an amount sufficient to discharge said bonds and accrued interest thereon. It being the duty of the general government to protect the state against Indian hostilities or insurrections, it was understood on all hands that Congress would provide for paying or reimbursing the state for expenses incurred in suppressing said Indian hostilities; and this appears upon the face of the act of the legislature in question. It declares that the bonds are payable out of any moneys which may be appropriated by Congress to defray the expenses incurred by the state in the suppression of said Indian hostilities, but, should no such appropriation be made, or if an amount sufficient should not be appropriated, within the ten years, then the bonds should be good and valid claims against the state. And Congress did make provision for paying such expenses incurred by the state. Section 9 of the act of Congress of August 5, 1854, making appropriations for the support of the army, reads as follows: "And be it further enacted that the Secretary of War be, and he is hereby, authorized and directed to examine into and ascertain the amount of expenses incurred and now actually paid by the state of California in the suppression of Indian hostilities within the said state prior to the first day of January, A. D. 1854, and that the amount of such expenses, when so ascertained, be paid into the treasury of said state: provided, that the sum so paid shall not exceed in amount the sum of $924,259.65, which amount is hereby appropriated out of any moneys in the treasury not otherwise appropriated": 10 Stat. 576. At the time this act was introduced in Congress—in January, 1854—the amount therein specified was estimated to cover all the state's liability, both principal and interest, incurred in suppressing Indian hostilities covered by the act of 1852, under which the present action is brought, and the act of 1851. But at the time the act passed, to wit, August 5, 1854, interest had accrued on the bonds issued under said acts of 1851 and 1852, so that the amount appropriated by

Congress fell short of the total amount of principal and interest then due.

Sawyer v. Colgan, supra, was an application for a writ of mandate to compel the controller of the state to issue a warrant upon the state treasury for the amount claimed to be due on a certain bond and on certain coupons. The bond was issued under the act of 1852, the same as the bonds from which the coupons in this case were detached. Some of the coupons in that case were attached to said bond 420. The other coupons were detached from bonds issued under the same act, and the remainder were detached from other bonds issued under the act of February 15, 1851. In reference to the bonds issued under the act of 1852, this court in that case said: "We think it is clear that the liability of the state upon the bonds thus provided for was conditional. They were conditioned upon the failure of Congress to make an appropriation to pay them. Upon the failure of Congress to do so, and not before, were they to become good and valid claims against the state. They were to be paid within ten years; and if Congress within that time made no appropriation to pay them, they were to be paid out of money in the state treasury not otherwise appropriated. Congress did make an appropriation to pay these bonds" (citing the provisions of the act of Congress of August 5, 1854, supra). "But it is said that subsequent acts of Congress imposed conditions which were not in any way binding on the bondholders, and that, in any event, the condition was not complied with until the funds provided by the act of Congress were paid into the state treasury. Neither of these contentions, we think, is sound." "The conditions therein provided were not unreasonable, but were merely such precautionary measures against imposition and fraud as Congress had a right to take. The act of May 3, 1852, contemplated action on the part of Congress, and the bondholders must have known when they accepted the bond that, if Congress made an appropriation to pay it, some safeguard would be provided to prevent fraud or imposition." The court then calls attention to the act of Congress of June 23, 1860, wherein the Secretary of War was authorized to pay out of the unexpended balance of the appropriation on said debt of the state of California, and, answering some of the contentions of the petitioner, says: "It is not sufficient answer to say that this balance was insufficient

to pay all the outstanding bonds and coupons. It is enough to know that petitioner's bonds and coupons would have been paid had they been presented at the proper time. . . . . If any of these obligations are not paid by reason of erroneous rulings on the part of the officers of the department, it is sufficient to say that the result is not due to the fault of the state or any of its officers. The latter have the right to rely upon the acts of Congress. The condition upon which the state was to be liable has not arisen. . . . . The bond on its face provides for payment by the state, 'provided the same be not sooner paid from funds anticipated in said act, to be derived from the government of the United States.' It was understood that Congress might pay the money over to the state, and in that event the bonds would be payable at the office of the state treasurer; but it was not unreasonable to suppose—and such was anticipated, doubtless—that the demands should be made payable by Congress at the national treasury. . . . . Our conclusion is that the state of California never became liable to pay bond 420, or its coupons, or any of the coupons in suit of the bonds issued under the act of 1852." In the same case the court held that the petitioner was entitled to the writ as to the coupons detached from the bonds issued under the act of 1851, on the ground of the difference between the two acts. Sawyer v. Colgan was heard in bank, and thoroughly discussed, and the conclusion therein arrived at is conclusive of this case. If, as there decided, "the state of California never became liable to pay bond 420, or its coupons, or any of the coupons in suit of the bonds issued under the act of 1852," it is too clear for argument that the state never became liable for any of the coupons sued on in this action. The coupons involved in that action were of the series No. 3, falling due January 1, 1855. Only one coupon of the series No. 2, for $70, is embraced in this suit. That series fell due January 1, 1854, and were embraced in the estimated expenses covered by the act of Congress. The series of coupons No. 3 never ripened, the act of Congress having been passed when they had only run seven months of the twelve. However, the amount appropriated by Congress was more than sufficient to cover all the bonds matured or partly matured, together with their coupons; and whether, in addition thereto, it was insufficient to provide for other and prior indebtedness not mentioned in the act of 1852,

makes no difference. By the act of 1852 it was expressly provided that the state would only be liable in case Congress failed to appropriate an amount sufficient to pay that indebtedness, and that was done. As said in Sawyer v. Colgan, these "coupons would have been paid had they been presented at the proper time," and that they have not been paid "is not due to the fault of the state or any of its officers." The judgment and order denying a new trial are reversed.

We concur: Garoutte, J.; Harrison, J.

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## BECK v. PASADENA LAKE VINEYARD LAND AND WATER COMPANY et al.*

L. A. No. 596; December 9, 1899.

59 Pac. 387.

**Irrigation—Water Rights of Individual—Deprivation by Corporation.**—Where a land owner is entitled to an undisputed right and easement in and to a certain proportion of water, which an association was entitled to take from a stream to supply its irrigating plant connected with his land, on payment of his proportionate share of the expenses of maintaining the plant, a corporation succeeding to the rights of the association and the rights of other individual owners takes its property subject to his easement, and cannot deprive him thereof, though it improves and extends the system, and changes open ditches to pipe-lines.[1]

APPEAL from Superior Court, Los Angeles County.

Action by George W. Beck against the Pasadena Lake Vineyard Land and Water Company and another. From a judgment for defendants, and orders denying a new trial and refusing to strike out the cost bill, plaintiff appeals. Reversed.

William H. Fuller for appellant; A. R. Metcalf and Anderson & Anderson for respondents.

*For subsequent opinion in bank, see 130 Cal. 50, 62 Pac. 219.

[1] Cited and approved in Knowles v. New Sweden Irr. Dist., 16 Idaho, 226, 101 Pac. 84, where it is held that an irrigation district cannot levy assessments against lands for which the owners already possess water rights, etc., unless the district first purchases or condemns these rights.

PER CURIAM.—This action was brought to establish by a decree of court that the above-named plaintiff was the owner of a one twelve hundred and fiftieth part of all the right, title and interest of the Lake Vineyard Land and Water Association, as the same was originally conveyed to and owned by said association, in and to all the waters of a certain stream in Los Angeles county, known as the "Arroyo Seco," and that plaintiff was entitled to have his said water flow through the pipes of defendants into his own pipes, connected therewith, upon the payment by him of one twelve hundred and fiftieth of the costs and expenses incurred in tending and keeping in repair the pipes, reservoirs and water plant of defendants. The plaintiff also asked for a perpetual injunction against defendants to prevent them carrying out their threat to shut the water out of his pipes, and discontinue supplying him with water. The evidence shows without conflict that the Lake Vineyard Land and Water Association was the owner of seven-tenths of all the waters of the Arroyo Seco, and that by mesne conveyances the plaintiff herein succeeded to one twelve hundred and fiftieth of said seven-tenths of said water as appurtenant to a certain two and one-twentieth acres of land, and the right to take and use the same from the pipes and reservoirs of said association. It also appears that the said association, prior to 1887, had conveyed to various individuals all its interest in the waters of the said Arroyo Seco, together with a right and easement in and to its system of ditches, reservoirs and water plant generally, to be used for the purpose of conducting and distributing said water by each of said transferees, on the payment by him of his proportion of the expense of maintaining said system; the said association retaining the title, however, in and to the ditches, flumes, reservoirs and pipes by means of which said waters were put to beneficial use by the grantees of said association and their successors in interest. The corporation defendant known as the Pasadena Lake Vineyard Land and Water Company was formed for the purpose of acquiring and controlling both the water that had originally belonged to the association and the system of ditches, reservoirs, flumes and pipes above mentioned. The two corporations defendant seem to have been under the same management for a time, and a conveyance was obtained from the association to the new corporation, on the fifteenth day of February, 1888, of everything that the

association had to convey. Nearly four-fifths of the water rights, originally in the association, were also conveyed to the new corporation, in exchange for stock therein, by the individuals owning such water rights. Upward of one-fifth of the waters conveyed away by the association still remain vested in the individuals to whom they were conveyed. It seems that the plaintiff, among others, has refused to convey his interest in the water, or his rights in the plant or system of ditches, pipes and reservoirs, to the corporation. The corporation has, however, fixed a uniform rate, which it charges its stockholders as well as those who refused to exchange their rights for stock in the corporation, and by this means the plaintiff finds himself in a worse position than he would be in if he had conveyed all his rights and interests to the corporation, for the stockholders are receiving, in addition to their proportion of the water, dividends, in which he is not allowed to share. The corporation refuses to furnish plaintiff with any statement of his proportion of expenses to be paid under the terms of the deed from the association to plaintiff's predecessor in interest, and threatens to deprive plaintiff of water altogether unless he pays the rates fixed by it as aforesaid. Since the conveyance to it from the association, the new corporation has changed its means of diversion from the open ditch, by which the water was formerly diverted from the arroyo, to a steel pipe, has cemented and lined the reservoirs, and has extended the system of pipes, and otherwise added to, repaired and improved its water plant generally. The case was tried before the court without a jury. There is no finding as to whether the plaintiff is the owner of the water which he alleges ownership in in his complaint or not. This was a material issue, and plaintiff was entitled to a finding addressed directly to the ownership of the water that he claimed to own; and on the undisputed evidence, briefly stated herein, that finding should have been in plaintiff's favor. Plaintiff was also entitled to a decree that he was the owner of one twelve hundred and fiftieth of seven-tenths of the waters of the said arroyo. There was no conflict in the evidence on this question. The court found that plaintiff was not "entitled to the use and flow of said waters so purchased as aforesaid upon paying to the Pasadena Lake Vineyard Land and Water Company his pro rata share or proportion of the costs and expenses in tending and keeping in repair

said pipes, flumes and reservoirs in which said water is stored and conducted to the lands and supplied to plaintiff," and dissolved the temporary injunction theretofore granted, and dismissed the action. We think this action of the court erroneous. The evidence of plaintiff's rights in the water and in the water system was to be found in the deed from the association to the Wilsons. Plaintiff had regularly succeeded to the rights, privileges and easements granted by that deed, so far as they appertained to the two and one-tenth acres of land claimed by him, and which were included in said deed. We think it beyond any question, and it seems to be admitted in the argument, that the deed to the Wilsons conveyed, not only the water claimed here by plaintiff, but the right and easement in the plant of the association to run the water through it, and have it delivered to them on the land, a part of which now belongs to plaintiff. The easement in these ditches, reservoirs and pipes was a property right, and the plaintiff succeeded to it by the same instruments through which he deraigns title to his land, and his title in such easements is just as effectual as his title to the land; and when the new corporation received its deed from the association it took the property therein described charged and encumbered with the easement to which it was subjected by the previous deed to the Wilsons. The new corporation could not, by improving or extending its system, or changing the open ditches to pipe-lines, acquire title to the water which belonged to others, nor could it thereby deprive others of any beneficial interest or right which they had in the system. We think that on the undisputed facts in the case the plaintiff and appellant was entitled to the perpetual injunction which he sought. On this view of the case it follows that the defendants were not entitled to judgment for costs, and therefore let the costs of the former trial abide the result of a new trial. The judgment and orders denying a new trial and refusing to strike out the cost bill are reversed.

## PEOPLE v. GARCIA.

Cr. No. 561; December 21, 1899.

59 Pac. 576.

**Grand Larceny—Information.—A Demurrer to an Information** on the ground that it was indefinite was properly overruled, as that is not one of the grounds for demurrer enumerated by Penal Code, section 1004.

**Grand Larceny—Information.—As Penal Code, Section 487,** declares that grand larceny is committed when the value of the property taken exceeds $50, an information is within the statute, whether it alleges that the stealing of property of such value was from the person or not.

**Grand Larceny.—Where the Evidence Tended to Show That an Alleged** larceny took place in a certain room, evidence that defendant lived therein was admissible, though it appeared that a woman jointly accused with him of the same offense lived in the same room, and the circumstance was possibly unfortunate to defendant with the jury.

**Criminal Law—Character of Accused.—The Cross-examination of Witnesses** who testified to defendant's general reputation for truth, honesty and integrity may take a wide scope.

**Larceny.—The Evidence in a Prosecution for Larceny of** money tended to show that the money was taken from an intoxicated person, to whom defendant afterward introduced a hack driver as his coachman, and directed the driver where to go and throw him out. Held, that, if it was error to admit evidence of what was thereafter done by the driver and defendant's victim in his absence, it was entirely harmless.

APPEAL from Superior Court, Los Angeles County.

T. N. Garcia was convicted of larceny, and he appeals from the judgment and from an order denying a new trial. Affirmed.

H. H. Appel and Davis & Morrison for appellant; Attorney General Ford for the people.

PER CURIAM.—By the information in this case T. N. Garcia and two females—Susie Douglass and Rosa Durbin—were jointly accused of grand larceny committed in the stealing, etc., from "the ownership and possession of Thomas Tom-

linson," certain money of the value of $295, the property of said Tomlinson. Garcia was tried separately. He was convicted of the offense charged, and has appealed.

Appellant demurred to the information on the alleged ground that the same "is indefinite, in that it cannot be ascertained therefrom whether said larceny is from the person or not." The demurrer was rightly overruled. Indefiniteness of the information is not a ground for demurrer thereto: Pen. Code, sec. 1004; People v. Markham, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620. Moreover, although the language of the information varied somewhat from the usual formula, yet, since it was alleged that the property stolen was above the value of $50, the offense charged was within the statutory definition of grand larceny, whether the stealing was from the person or not: Pen. Code, sec. 487. So that the information can no more be called indefinite for failing to show whether the money was taken from the person of Tomlinson, than for failing to show whether it was taken from his house.

The chief insistence of appellant in this court seems to be that on the trial the court below allowed the district attorney to show ("in devious and improper ways," it is claimed) the existence of immoral relations between appellant and said Rosa Durbin. Many instances of evidence having this bearing and admitted by the court are specified as error in the brief of appellant. It would not be profitable to discuss them singly. There was evidence tending to prove the following facts, among others: Said Susie Douglass occupied room 47, and said Rosa Durbin occupied room 49, of a certain building in the city of Los Angeles. Tomlinson, a stranger in the city, visited them at said rooms on the evening when the alleged larceny occurred, having then in his possession paper currency to the amount stated in the information. Appellant, Garcia, was also present, and the party passed some hours in carousing together at Tomlinson's expense. Late in the evening Tomlinson had become grossly intoxicated, and all his money aforesaid was gone. Appellant then caused him to be taken away in a hack, instructing the driver, among other things, to keep silent, and to "take him somewhere and throw him away." Immediately afterward appellant handed to said Rosa Durbin $80 in bills of like character and denominations with some of the said money of Tomlinson and she secreted

them. She testified that appellant took the same from Tomlinson, and there was evidence other than hers that by appellant's direction she paid the driver for "hauling" Tomlinson away. Under the circumstances detailed, the close associations existing between Rosa Durbin and defendant, Garcia, are quite apparent. The evidence tended to show that the larceny took place in the Russ House, and probably in room 49. The fact that defendant lived in that room was admissible evidence. And, if it also appeared that Rosa Durbin lived in the same room, such circumstance possibly was an unfortunate one for defendant in the eyes of the jury. At the same time, it is a circumstance of which defendant is not entitled to complain. We see nothing objectionable in the cross-examination of defendant's witnesses who took the stand and testified as to his general reputation for truth, honesty and integrity. The cross-examination of that class of witnesses may take a wide scope.

Appellant introduced the said driver to Tomlinson as his (appellant's) coachman, and directed the driver where to go and to throw Tomlinson out. The driver testified that he took him to the place indicated by appellant; that he opened the door of the carriage, and Tomlinson "crawled out." It is objected that this evidence, and some other of similar character, was improper, because the things done by Tomlinson and the driver were not in the presence of appellant. Conceding the ruling of the court to be error, still it is apparent that the error was entirely harmless.

The other points made by appellant have, we are disposed to think, as little merit as the one last considered. It seems unnecessary to state them in detail, though we have attentively examined them all. The judgment and order denying a new trial are affirmed.

## HENNE v. LOS ANGELES COUNTY.*

L. A. No. 760; December 29, 1899.

59 Pac. 780.

**Taxation—Mortgages.—Neglect or Refusal of a Land Owner** to return a mortgage on his land for taxation does not authorize the assessor to arbitrarily assess it to him, since Political Code, section 3629, requires the land owner to return only property belonging to himself; and section 3633, authorizing arbitrary assessment on refusal of the owner to make a statement, applies only to property belonging to him; and section 3650, subdivision 15, requires the assessor to deduct mortgages and assess them to their owner.

**Taxation—Mortgages.—Where the Assessor Fails to Enter** the value of mortgages on land assessed, in the proper column, and deduct the same, as required by Political Code, section 3650, subdivision 15, it cannot be presumed that he made the proper deductions, but failed to so state on the assessment-roll.

APPEAL from Superior Court, Los Angeles County.

Action by C. Henne against the county of Los Angeles. From a judgment for defendant plaintiff appeals. Reversed.

R. L. Horton for appellant; J. C. Rines for respondent.

CHIPMAN, C.—Action to recover certain taxes claimed to have been illegally exacted. Plaintiff alleges ownership of certain real estate situated in the city of Los Angeles; that said property was assessed for the fiscal year 1898–99 as of the value of $96,530; that at the time of said assessment there was a mortgage resting upon said property, executed by plaintiff to the regents of the University of California, for the sum of $35,000, no part of which had been paid, and that the same remained unpaid on the first Monday of March, 1898; that no deduction or credit was made or given plaintiff upon the assessment-roll on account of said mortgage, and the assessor failed and refused to treat said mortgage as an interest in the property affected thereby, or to deduct the value of said mortgage security from the value of said property, but assessed the entire value thereof to plaintiff; that on July 23, 1898, plaintiff made a demand in writing upon the assessor that he correct said assessment by deducting from the value of said

*For subsequent opinion in bank, see 129 Cal. 297, 61 Pac. 1081.

property assessed to plaintiff, and affected by said mortgage, the value of said mortgage, alleged to be $35,000; that the assessor refused; that thereafter, on November 3, 1898, plaintiff filed his verified petition before the board of supervisors of defendant county, requesting the said board to correct, or order to be corrected, on the assessment-roll of said county, the assessment of plaintiff, by deducting from the value of said property assessed to plaintiff, and affected by said mortgage, the value of said security, and that said board denied said petition; that on November 19, 1898, plaintiff paid said taxes, amounting to $1,287.06, under a written protest addressed and delivered to the tax collector of said county, specifying therein the portion of said assessment claimed to be void, and the ground on which said claim was founded. Then follow allegations showing what was contained in said protest, which appears to have set out a copy of the assessment as shown by the assessment-roll, a copy of which is found in the complaint, and specifically setting forth the facts as above. The alleged offer was, upon failure to grant the deduction claimed, to pay the whole of said tax under protest, "under and by virtue of the provisions contained in section 3819 of the Political Code." The alleged excess payment amounted to $466.66⅔. It is alleged that on November 21, 1898, plaintiff presented his verified demand in writing upon the treasury of the county, to said board of supervisors, which was rejected by the board January 5, 1899, and that no part of said claim has been paid. Defendant demurred to the complaint on several grounds. The only ground now urged is insufficiency of facts. Defendant had judgment of dismissal on the demurrer, from which this appeal is prosecuted.

Under the provisions of section 4, article 13, of the constitution of this state, and subdivision 15 of section 3650 of the Political Code, it was the obvious duty of the assessor to deduct the amount of the mortgage held by the regents of the university from the assessed valuation of the land, the subject of the mortgage: Hollister v. Sherman, 63 Cal. 38; People v. Board of Supervisors, 77 Cal. 136, 19 Pac. 257. In effect, plaintiff was assessed, not only on his own property, but upon that of the mortgagee. To the extent that plaintiff's assessment was increased by the assessor's failure to deduct the amount for which the mortgage was assessable, the assessment was void, and may be recovered back, under section 3819 of the Political Code. Respondent does not dispute the liability as

a general proposition, but it contends that, because the complaint does not allege that plaintiff made to the assessor the statement required by section 3629, such neglect subjected plaintiff to the arbitrary assessment provided for by section 3633. Section 3629 provides that the assessor "must exact from each person a statement, under oath, setting forth specifically all the real and personal property owned by such person," etc. In six separate paragraphs are pointed out the facts required to be shown by the statement. They are all designed to compel from the taxpayer a disclosure of the taxable property owned by him, not taxable property owned by some other person. Paragraph 5 makes it the duty of the owner of mortgages, deeds of trust, etc., to return the same. It is not made the duty of the owner of the mortgaged land to return the mortgages held by his mortgagee. Section 3630 makes provision for blank forms for statements mentioned in section 3629. Section 3631 provides that "the assessor may fill out the statement at the time he presents it, or he may deliver it to the person and require him, within an appointed time, to return the same to him, properly filled out." Section 3632 gives the assessor power to require every person found within his county to subscribe an affidavit, giving his name and residence; to subpoena and examine any person in relation to any statement furnished to him; and, under certain restrictions, a refusal to make the statement required by law, or to appear or to make the affidavit above referred to, may for each refusal work a forfeiture of $100 to the people of the state. Section 3633 provides that "if any person, after demand made by the assessor, neglects or refuses to give, under oath, the statement herein provided for," etc., the assessor must estimate the value of the property of the person so refusing and transmit the same to the board of supervisors, with a statement of the facts. The board must thereupon require each taxpayer affected by such assessment to make a statement under oath, etc., and if any taxpayer, after demand, shall neglect or refuse to deliver to the board the statement provided for under oath, etc., the board, sitting as a board of equalization, "must increase such assessment and valuation to such an amount as the said board shall deem just; but the value fixed by the assessor must not, in any case, be reduced by the board of supervisors." Section 3650 provides that the assessor "must prepare an assessment-book . . . . in which must be listed all the property within the county, under the

appropriate head: 1. The name of the person to whom the property is assessed." Then follows numerous subdivisions designating the various kinds of property, real and personal. "15. When any property, . . . . is subject to or affected by a mortgage, deed of trust, contract or other obligation by which a debt is secured, he [the assessor] must enter in the proper column the value of such security, and deduct the same," etc. Section 3627 provides: " . . . . In case of debts so secured, the value of the property affected by such mortgage, . . . . less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof," etc. Section 3678 provides: "To assist the assessor in the performance of his duties, the recorder must annually transmit to the assessor, . . . . a complete abstract of all mortgages. . . . . Such abstract shall be written under appropriate headings, to embrace all information requisite for the assessor," etc.

It is claimed by respondent that the property owner who fails to make the statement under section 3629 is in no position to complain of any error the assessor may make unless the assessment is void upon its face; citing City and County of San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264; Orena v. Sherman, 61 Cal. 101. It is also claimed that it is the duty of the taxpayer to disclose to the assessor the nature and amount of the mortgage secured by his land, failing in which he cannot be heard to complain, and the assessor may make the arbitrary assessment contemplated by section 3633. Orena v. Sherman is very briefly reported, but I think it sufficiently appears to be a case where the assessor had demanded a statement under section 3629, and the taxpayer had refused to make it. In City and County of San Francisco v. Flood the question was whether the term "mining stock" was a good description of personal property. Respondent relies upon the following remarks in the opinion: "If the description was taken from a list furnished by the defendant, . . . . he ought not to be heard to complain of the insufficiency of the description. If made by the assessor without the aid of such list, the assessor has given a description as certain as could reasonably be required of him, and under such circumstances the defendant's objection to the assessment should be disregarded." The case goes no further than to hold that, where the description is intelligible, the taxpayer cannot complain if he has failed to make the statement mentioned in the stat-

ute. It does not decide, nor was the question involved, that the taxpayer who neglects to make a statement is conclusively bound in all respects by the statement made out by the assessor. We do not think the assessor is authorized to make an arbitrary assessment under section 3633 except upon the neglect or refusal of the taxpayer to give the statement "after demand made by the assessor." The statute plainly so declares. There is no question here of overvaluation of plaintiff's property, and an appeal by plaintiff to the board of equalization would not have resulted in reducing the assessed valuation of his land; for he did not, and does not, complain of the valuation. The board would have had the power to direct the assessor "to enter upon the assessment-book any property which has not been assessed" (section 3679), which would have included the mortgage in question; but in this case, had the board so directed, the mortgage, which was omitted from the assessment-book, could not have been taxed, as it was state property: Hollister v. Sherman, supra. And the board of equalization is nowhere given authority to direct the assessor to enter on the assessment-book the value of any security resting upon land which is taxed, and deduct the same from the assessed value of the land. That is a duty directly devolved upon the assessor, which we think the taxpayer has a right to presume has been performed or will be performed, whether the taxpayer makes a statement or not. If the assessor should demand a statement, the law only requires the taxpayer to include therein all his taxable property; and an omission on his part to call attention to a mortgage resting upon his land would not relieve the assessor from discharging his duty, which is to assess the land to its owner at its value, and to assess the mortgage thereon to the holder, and deduct the value of the mortgage from the value of the land as assessed. It is the duty of the assessor to enter the facts upon the assessment of the owner of the land: Knott v. Peden, 84 Cal. 299, 24 Pac. 160. There is no power given the assessor by section 3633 to arbitrarily assess the mortgage to the owner of the land, by way of penalty or otherwise, nor to refuse or neglect to deduct it from the value of the land, because the land owner has omitted to make a statement, or to do so even where he had refused, upon demand, to make a statement. The assessor may in the latter case fix his own valuation on the land, but he must also deduct therefrom the value of the mortgage, and assess it to the holder.

It cannot be presumed, as respondent urges, that the assessor has actually made the proper deductions, although he failed to so state on the assessment-roll. The law requires the assessor to enter the value of the security in the proper column for such entry, and deduct the same. The copy of the assessment set out in the complaint shows that there was an appropriate column for such an entry, but the assessor failed to enter therein the value of the security, or make any deduction on account of it. There was no excuse for this, for he is furnished by the county with a list of all mortgages. So far from his being protected by a presumption that he discharged his duty, the complaint shows a plain neglect of duty.

If the assessor willfully omits to assess a mortgage, he is liable on his bond for the taxes (section 3660); and if the mortgage escapes taxation, it may be doubly taxed the following year, if still owned by the same person (section 3649). But, while these provisions are intended to protect the tax fund, they do not relieve the mortgagor, who has not received the benefit of the deduction. If he pays his tax under protest, in compliance with the provisions of section 3819, he may recover back the tax paid by him upon the amount of the mortgage which he was entitled to have deducted from the assessment against his land. The judgment should be reversed and the cause remanded.

We concur: Haynes, C.; Gray, C.

McFARLAND, J.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

TEMPLE, J.—I concur in the judgment solely upon the ground that the taxpayer is not subjected to the penalty of a so-called arbitrary assessment for failure to furnish to the assessor a list of his taxable property unless such list has first been demanded by the assessor. It does not appear in this case that such a list was demanded. I do not concur in the apparent intimation that, though such list has been demanded, the taxpayer could complain if he did not furnish a list which would show the mortgages to which the property is subject. If the list does not show the mortgages, in my opinion, it would not constitute such a list of his taxable property as is required. If the opinion can be understood as holding that only when the taxpayer has failed to return a list is the assessor entitled to value the property, or change values made

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There is no appeal by any other defendant, and no appeal from the judgment. Mabel Varney was made a defendant because she claimed to own the property the subject of the action. The court found that the property belonged to defendant Ellwood Varney, and that appellant at no time had any interest in it. A careful examination of the evidence convinces us that it justifies this finding. Whether the receiver was properly appointed, and could, under his appointment, take possession of and hold the rents, issues and profits of the mortgaged land, and apply them to the payment of the mortgage debt, are questions which do not concern appellant in view of the finding referred to above. If the court erred in its conclusions, appellant was not injured, and hence cannot be heard to complain. This view of the matter makes it unnecessary to discuss the numerous interesting questions presented in the briefs.

The witness Smith was asked whether she heard Ellwood Varney say anything about the ownership of the livestock now claimed by his wife, Mabel, and, if so, what he said. Defendant Mabel Varney objected to the question as irrelevant and incompetent, and that what was said does not purport to be in presence of Mabel Varney, who claimed to own the livestock. The principal question of fact was whether the husband or the wife owned the property. When this testimony was offered, the husband had not testified in the case, and therefore it was not admissible to contradict or impeach him. Nor was it admissible as against his wife. It was only competent as a declaration affecting him and his rights, and should have been so limited by the court. The objection, however, was general, and, when made in that form, and the court failed to limit the application of the testimony, it was the duty of counsel to ask to have it so limited since it was admissible for some purposes. What has been just said applies to the ruling made when plaintiff was called as a witness, and was asked to state a conversation he had with Ellwood Varney.

It appeared from the evidence that the receiver was awarded possession of the rents which had accrued prior to his appointment, and which had not as yet been paid over to Varney by the tenant, as well as rents accruing and to accrue after his appointment. We very much doubt his right to rents which had accrued prior to his appointment. But, as there is no appeal by Varney, or by anyone other than Mrs. Varney, who the court found had no interest in or right to the property,

by the taxpayer, I also dissent from that view. In my opinion, it is always the duty of the assessor to value the property for himself, and that in all cases he not only may, but should, refuse to be bound by the valuations made by the taxpayer. I doubt the propriety of the term "arbitrary assessment": See People v. National Bank of D. O. Mills & Co., 123 Cal. 55, 55 Pac. 685.

I concur: Henshaw, J.

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## BAKER v. VARNEY et al. (WILLIAMS, Intervener).*

Sac. No. 567; January 13, 1900.

59 Pac. 778.

**Appeal.—A Party Who is not Injured by a Judgment** cannot be heard to complain on appeal from an order denying him a new trial.

**Trial.—Where an Objection to Testimony,** which is admissible for some purposes, is general, the court's failure to limit it is not error if counsel do not ask that it be limited.

APPEAL from Superior Court, Sutter County.

Action by G. W. Baker, as receiver, against Mabel Brett Varney and others. There was a judgment for plaintiff, and from an order denying her motion for a new trial defendant Mabel Brett Varney appeals. Affirmed.

J. H. McKune and R. Platnauer for appellant; Richard Belcher for respondent; A. M. Johnson for intervener and respondent.

CHIPMAN, C.—Plaintiff brings this action, as receiver in the foreclosure suit brought by the intervener against defendant Ellwood Varney, to recover possession of certain livestock, claimed to be rents, issues and profits of the mortgaged premises, for an accounting with defendants, and for an injunction to restrain defendants from disposing of said livestock or dividing the same among defendants, and for general relief. Plaintiff had judgment. Defendant Mabel Varney moved for a new trial, and appeals from the order denying her motion.

*For subsequent opinion in bank, see 129 Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 100.

There is no appeal by any other defendant, and no appeal from the judgment. Mabel Varney was made a defendant because she claimed to own the property the subject of the action. The court found that the property belonged to defendant Ellwood Varney, and that appellant at no time had any interest in it. A careful examination of the evidence convinces us that it justifies this finding. Whether the receiver was properly appointed, and could, under his appointment, take possession of and hold the rents, issues and profits of the mortgaged land, and apply them to the payment of the mortgage debt, are questions which do not concern appellant in view of the finding referred to above. If the court erred in its conclusions, appellant was not injured, and hence cannot be heard to complain. This view of the matter makes it unnecessary to discuss the numerous interesting questions presented in the briefs.

The witness Smith was asked whether she heard Ellwood Varney say anything about the ownership of the livestock now claimed by his wife, Mabel, and, if so, what he said. Defendant Mabel Varney objected to the question as irrelevant and incompetent, and that what was said does not purport to be in presence of Mabel Varney, who claimed to own the livestock. The principal question of fact was whether the husband or the wife owned the property. When this testimony was offered, the husband had not testified in the case, and therefore it was not admissible to contradict or impeach him. Nor was it admissible as against his wife. It was only competent as a declaration affecting him and his rights, and should have been so limited by the court. The objection, however, was general, and, when made in that form, and the court failed to limit the application of the testimony, it was the duty of counsel to ask to have it so limited since it was admissible for some purposes. What has been just said applies to the ruling made when plaintiff was called as a witness, and was asked to state a conversation he had with Ellwood Varney.

It appeared from the evidence that the receiver was awarded possession of the rents which had accrued prior to his appointment, and which had not as yet been paid over to Varney by the tenant, as well as rents accruing and to accrue after his appointment. We very much doubt his right to rents which had accrued prior to his appointment. But, as there is no appeal by Varney, or by anyone other than Mrs. Varney, who the court found had no interest in or right to the property.

the question need not be determined. Whatever may be the right of the receiver to the property, Mrs. Varney has none, and cannot be heard to complain of the judgment. If it be claimed that she got some right by the division of the rents made on October 17, 1896, referred to in the findings, it must rest upon the assumption that the cattle were hers when first purchased for the purpose of stocking the farm. But the court found, and the evidence justified the finding, that her husband was the real purchaser and owner at that time, and the court also found that it was community property, which is justified by the evidence, even though it be conceded that the property was purchased for her account. The evidence showed that it was paid for from the rents of the farm. In no view of the case can we see that appellant is personally concerned in or injured by the judgment. It is advised that the order denying the new trial be affirmed.

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## CLARKE v. MOHR et al. (KOWALSKY et al., Intervener)*

S. F. No. 1771; January 18, 1900.

59 Pac. 825.

**Appeal—Alteration of Record—Dismissal.—Where, After Numerous Motions** to supply the defects in a record in the supreme court, appellant's attorney makes alterations in the printed record, by underscoring various passages, and by marginal notes and interlineations in writing, for the purpose of directing attention to particular parts of the record, and, without leave of court, alters his reply brief by pasting therein numerous leaflets containing citations of authorities, and comments thereon, of which no service is made on opposing counsel, thus imposing upon the court more labor than would have been required to dispose of the case on its merits if presented in an orderly manner, and there appears to be no substantial merit in the appeal, it will be dismissed.

APPEAL from Superior Court, City and County of San Francisco.

Action on a promissory note by J. F. Clarke against Henry Mohr, Kate C. Byrne, Florence B. Hinckley and others. Complaints in intervention were filed by Henry I. Kowalsky and Timothy Hurley. From a judgment in favor of the intervenér

*For former opinion, see 125 Cal. 540, 58 Pac. 176.

Kowalsky, plaintiff and the intervener Hurley appeal. Motion by intervener Kowalsky to dismiss the appeal. Appeal dismissed.

Alfred Clarke for plaintiff; Wilson & Wilson and H. Wilkins for defendants; T. J. Crowley and A. R. Cotton for interveners.

PER CURIAM.—A printed transcript of a portion of the record of this case was filed here January 12, 1899, and since that date the court has been simply deluged with motions to supply its defects, and to dismiss the appeals from the judgment and order denying a new trial. At present the printed record and briefs make a very modest show by the side of the bulky mass of papers of every shape and hue—in manuscript and typewriting—which constitute the files of the case. The faults of procedure on the part of counsel have cost the court far more trouble than would have been required to dispose of the case upon its merits if it had been presented in the simple and orderly manner provided for in our rules, and the court is brought seriously to consider whether we are justified in devoting more of our time to the unraveling of the legal tangles gratuitously imported into this case at the expense of litigants who present the merits of their appeals unembarrassed by such superfluous difficulties.

Some months ago, in department 1, an order was made dismissing the appeals herein from the order denying a new trial, and overruling the motion to dismiss the appeals from the judgment: 125 Cal. 540, 58 Pac. 176. Since the order was made the attorney for appellants has taken the liberty of making a number of alterations in the printed record on file here by underscoring various passages, and by marginal notes and interlineations in writing. It is true that none of these alterations is of much consequence; for, in spite of them, the court can easily see what the real record is. The transcript is simply marred and defaced, without being materially altered or changed in meaning, and it is evident that the alterations were made, not with any intention of practicing an imposition upon the court, but rather for the purpose of directing attention to particular parts of the record, and to papers among the files which counsel supposes to have an important bearing upon his assignments of error. Besides these alterations in the record counsel for appellants has altered his

reply brief by pasting therein numerous leaflets, containing citations of authorities and comments thereon. As to these additional citations, the court would have permitted them in accordance with its usual practice, if leave had been asked, but it would have required service of the amendments on the opposing parties. It will thus be seen that, although the fault of counsel in making those unauthorized changes in the record and printed brief is not a trivial one, it is doubtful whether it is a sufficient ground for dismissing the appeals from the judgment, as we are again asked to do.

But one result of these alterations, and the motion to which they have given rise, is that we have been compelled again to go on through the papers in the case, and to make a pretty thorough examination, not only of the record proper, but of many of the loose papers which have been added to it. The result is the discovery that there is no substantial merit in the appeal. All that is left is the appeal from the judgment, which is fully in accordance with the substantial rights of the parties, it being plain from the unquestioned and unquestionable findings of the superior court that neither of the appellants was ever entitled to any relief in the action. On this point they make no serious contention that the superior court erred, but they attack the judgment for the intervener on various purely technical grounds. We cannot see what concern it is to them whether the intervener is entitled to a judgment or not. They do not have to pay it, and the defendants, who do have to pay, consented to it. Such being the case, we do not feel obliged to waste more time upon it. The appeals are dismissed.

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## BATES et al. v. ESCOT et al.

S. F. No. 1845; January 30, 1900.

59 Pac. 943.

**Equity—Demand for Jury—Specific Issues.**—Where defendant's answer raises issues of fact on which he is entitled to a jury, but the principal features of his defense are equitable, a demand for a jury must relate to the specific issues on which he is entitled to the same.

APPEAL from Superior Court, Fresno County.

Proceedings by George E. Bates and E. O. Miller against Joseph Escot and another. From a judgment for plaintiffs and from an order denying a new trial defendant Escot appeals. Affirmed.

Lyman I. Mowry for appellant; M. K. Harris for respondents.

CHIPMAN, C.—Foreclosure. Defendant Alferitz disclaimed any interest in the land. Defendant Escot, maker of the mortgage, answered and set up want of consideration for the mortgage debt, and also pleaded fraud and undue influence by plaintiffs in securing the execution of the notes and mortgage. The court gave judgment of foreclosure against Escot, from which, and from the order denying his motion for a new trial, he alone appeals. Escot alleged in his answer, and the court found, that on March 9, 1892, he and plaintiff entered into a contract by which plaintiffs, as agents of defendant, undertook to procure title from the state to certain two thousand four hundred and one and ninety-five hundredths acres of land, situated in Merced county, for four dollars per acre; and defendant paid at the time $1,000 on account of said purchase, and later $1,000 more. It is not claimed by defendant that there was anything unconscionable or fraudulent in this contract. The evidence tends to show that the contract of the parties was changed by substituting for it a deed of the land from plaintiffs to defendant, the transfer to him of the certificates of purchase, which had been taken in plaintiffs' names, and a mortgage back to plaintiffs for the unpaid balance, defendant assuming in the deed the payment of an unpaid balance of one dollar per acre to the state; that this change was made to accommodate defendant and place in him the legal title, so that he could the better control the land and protect it from trespassers; that the amount to be paid was figured at three dollars per acre, instead of four dollars, from which was deducted the $2,000 already paid, leaving due $5,205.85, for which the notes and mortgage were given, less one per cent (the two notes being for $2,602.92 each, and defendant was to pay the other one dollar per acre to the state); that the change in the agreement did not increase the price to be paid by defendant, but only changed the form of his obligations, and relieved the plaintiffs from further attention to payments of principal or in-

terest to the state. In short, it was a natural and simple adjustment of the matter, and on its face bears no earmarks of overreaching or unconscionable advantage by plaintiffs; and the fact that the mortgage included lands other than those being secured from the state is in no wise inconsistent with perfectly fair dealing. Counsel devote much attention to the law governing principals and agents, and to the fiduciary relation of agents, which they claim arose under the original contract. We have carefully examined all the evidence, and are of the opinion that it amply supports the finding that defendant's allegations of fraud and undue influence were untrue. We do not, therefore, find it necessary to notice further this portion of defendant's brief.

Defendant demanded a jury to try the cause, which the court refused, and the ruling is assigned as error. The action was equitable in its character, and so were the principal features of the defense. Defendant was not entitled to a jury upon these issues. If there was an issue of fact presented by the answer which defendant was entitled to have tried by a jury, the demand should have been more specific. We see no error in refusing the demand made. Finding no error in the other assignments mentioned in defendant's brief, it is advised that the judgment and order be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## MORAN et al. v. LENNON.

S. F. No. 1534; February 2, 1900.

59 Pac. 941.

**Replevin.—Plaintiff Purchased Defendant's Property at Execution Sale,** which defendant refused to deliver, claiming that he furnished plaintiff the money to purchase the property for him. Plaintiff's testimony showed that she never had a conversation with defendant about purchasing the property, and that she obtained the money from her daughter, who borrowed it for the purpose, and that defendant held the property after the sale under a lease from plaintiff. Held, the evidence was sufficient to support a finding that plaintiff was the owner and entitled to the possession.

APPEAL from Superior Court, San Mateo County.

Action by Margaret Moran and another against John Lennon. From a judgment for plaintiffs and an order overruling a motion for a new trial defendant appeals. Affirmed.

I. S. Thompson for appellant; E. F. Fitzpatrick for respondents.

COOPER, C.—This action was brought to recover the possession, or, in case a delivery cannot be had, the value of certain personal property, consisting of hotel furniture, dishes, bedding, etc., described in the complaint. The case was tried before the court without a jury, and findings filed, upon which judgment was ordered and entered for plaintiffs. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order.

It is not claimed that the judgment is not supported by the findings, and it is therefore not necessary to consider any question as to the appeal from the judgment. The court found that the plaintiffs were the owners and entitled to the possession of the property, and the principal point urged here is that this finding is not supported by the evidence. The evidence shows without conflict that prior to September 10, 1895, the defendant was the proprietor of the Villa Hotel, at Colma, in San Mateo county, and was the owner of the property in controversy, using the same in said hotel. The sheriff of the county, by virtue of an execution in his hands against the defendant, had levied upon the said property, and advertised that on said day, at 10 o'clock A. M., in front of said hotel, he would sell the same at public sale to the highest bidder to satisfy the said execution. Accordingly, at said sale, the plaintiff Margaret Moran being the highest bidder, the property was sold to her by the said sheriff for $425.25, which amount she paid, receiving the usual certificate of sale from the sheriff. No question is made as to the execution or the regularity of the sale. Neither is it claimed that the certificate of sale did not convey the legal title to said plaintiff Margaret Moran. Plaintiff James Moran is the husband of Margaret. It is claimed by defendant that he furnished the money with which the property was so purchased, and that the property was in fact purchased in trust for him, and at his instance and request. The plain-

tiff Margaret Moran testified that she did not get the money from defendant with which to purchase the property, and that she never had a conversation with him about purchasing it; that she got the money from her daughter, and with the money bought the property in her own name and for herself. The daughter of the plaintiffs testified that she borrowed the money for her mother from the Bank of San Mateo County, and gave the bank her note and mortgage for it. This evidence supports the finding of the court. In fact, in view of the testimony in the record, and of the fact that the defendant held the property after it was so purchased by the plaintiff Margaret Moran under a written lease from her which he had never surrendered, we do not see how the court could have found any other way. There was no error in the refusal of the court to admit in evidence the agreement between defendant and his wife dated June 23, 1896. It was made long after the execution sale, and had no reference thereto. Neither did the subject matter of the said contract in any way tend to show that defendant furnished the money to plaintiff Margaret with which to purchase the property. There is no other point in the record worthy of discussion. The judgment and order should be affirmed.

We concur: Haynes, C.; Britt, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## HOUSER & HAINES MANUFACTURING COMPANY v. HARGROVE.*

Sac. No. 738; February 3, 1900.

59 Pac. 947.

**Appeal—Time.—An Appeal may be Taken from an Order** denying a motion for new trial, when made within proper time after the denial, though the time limited for appeal from the final judgment has expired.

**Appeal—What Reviewable.—On Appeal from an Order Denying** a motion for a new trial, the court will consider the sufficiency of the evidence, and the errors of law, if any, occurring during trial.

*For subsequent opinion in bank, see 129 Cal. 90, 61 Pac. 660.

**Sale.—Plaintiff Delivered a Harvester to R. Under Contract** that it did not part with title until notes given therefor were fully paid, and in case of default it was, if it wished, to take possession of the harvester, and all payments thereon were to be retained as compensation for its use prior to the default. After default in payment, R. sold the harvester to defendant for a valuable consideration. Held, that R., having no title, but only a right to secure title, could convey none to defendant, and that plaintiff was the owner, and entitled to possession.

**Sale.—Plaintiff Delivered a Harvester to R., Retaining Title** until payment made. The tax thereon, together with the tax on several other items of personal property belonging to R. alone, was assessed to "R. and wife and H." (the plaintiff), and the harvester was sold to defendant for delinquent taxes. Held, that, under Political Code, sections 3628, 3636, providing that the assessor shall ascertain the name of the owner, and assess the property to him, and, if unable to ascertain the name, shall assess it to the "unknown owner," the assessment was invalid.

**Taxation.—A Sale of the Personal Property of H.** for taxes due, not by him alone, nor upon the property alone, but for taxes on property not owned by H., and given to the assessor as the property of R., is void, under Political Code, sections 3820, 3821, providing for a collection of the personal property tax by seizure and sale of any personalty owned by the person against whom the tax is assessed.

**Taxation—Mistake in Name.—Political Code,** section 3628, providing that a mistake in the name of the owner of real property shall not invalidate the assessment for taxes, has no application to an assessment of personal property, and hence an assessment of H.'s personal property to "R. and wife and H." cannot be held valid thereunder.

APPEAL from Superior Court, Madera County.

Action by Houser & Haines Manufacturing Company against R. L. Hargrove. From a judgment in favor of defendant and from an order denying new trial plaintiff appeals. Order reversed.

Louttit & Middlecoff for appellant; R. L. Hargrove in pro. per.

COOPER, C.—Judgment was entered in the court below in favor of defendant. Plaintiff has appealed from the judgment and from an order denying its motion for a new trial. The judgment was entered on the twelfth day of August, 1897, and the notice of appeal therefrom served

August 2, 1890; therefore this court will not entertain the appeal from the judgment. The order denying plaintiff's motion for a new trial was made and entered June 6, 1899, and notice of appeal from this order served August 2, 1899. The appeal from the order denying the motion for a new trial was taken within sixty days after the order, and it makes no difference that the time for appealing from the judgment has elapsed. The motion for a new trial, under our code and practice, is a proceeding independent of the judgment, and the motion may be granted, even after the judgment has been affirmed on appeal: Brison v. Brison, 90 Cal. 327, 27 Pac. 186. Upon an appeal from an order denying a motion for a new trial, we may consider whether the evidence is sufficient to sustain the findings and errors of law, if any, occurring during the trial: Brison v. Brison, 90 Cal. 329, 27 Pac. 186; Riverside Water Co. v. Gage, 108 Cal. 243, 41 Pac. 299.

The complaint alleges that on the sixth day of June, 1896, the plaintiff was, and ever since has been, the owner and entitled to the possession of "One Haines-Houser Improved Combined Harvester," of the value of $1,000; that the defendant on said date wrongfully took the said property into his possession, and ever since has unlawfully withheld and detained the same. Judgment is asked for the recovery of the possession of the said harvester, or the value thereof, in case a delivery cannot be had. The answer denied that plaintiff ever was the owner or entitled to the possession of the harvester, and alleged that the defendant was, on the second day of June, 1896, "ever since has been, and now is, the owner and entitled to the possession of said property." The case was tried before the court without a jury, and findings filed. The court found that the plaintiff was not, at the time of the commencement of the action, the owner, or entitled to the possession, of the harvester; and further found that the defendant was, at the time the action was commenced, and still is, the owner and entitled to the possession thereof; that the value thereof was $1,000; and that defendant is entitled to judgment. The findings are quite voluminous and cover some sixty-seven folios of the transcript. The greater part of them consists of probative facts, recitals of evidence and copies of documents that properly should have no place therein. The main and material findings are those herein

stated as to ownership of the property, and we do not think the evidence set forth in other parts of the findings, or in the record, supports them. There is little, if any, conflict as to the facts, and we must determine from them as to whether the plaintiff or defendant was the owner of the harvester at the time the action was commenced. On June 10, 1893, one Rowe gave an order in writing to Houser, Haines & Knight for the harvester, for which he was to pay $1,400, according to the terms of certain notes to be executed by him. This order contained the following clause: "If upon one week's trial the machine should not work well, the purchaser shall give immediate notice to said Houser, Haines & Knight, or their agent, and allow time to send a person to put it in order. If it cannot then be made to work to the entire satisfaction of the purchaser, he shall return it at once to the agent of whom he received it, and his payment, if any has been made, will be refunded." The harvester was, in pursuance of the said written order, delivered to Rowe, and, after being tried and tested, on the fourth day of August, 1893, an agreement of sale was entered into and signed by said Rowe and the Houser & Haines Manufacturing Company, a corporation, under the terms of which the said corporation agreed to sell to said Rowe the said harvester for $1,400, the same to be paid for in three notes to Houser, Haines & Knight—one for $500, due September 1, 1893; one for $500, due September 1, 1894; and one for $400, due September 1, 1895. This agreement contained the following clause: "And it is agreed that said Houser, Haines & Knight do not part with the title to said harvester until all said deferred payments or notes are fully paid; that time is of the essence of the agreement; that, should the undersigned make default in any of said payments, then said Houser, Haines & Knight shall at their option, and without notice, terminate this agreement, and with or without legal process take and retain said harvester, wherever it may be situated, and all moneys paid by the undersigned prior to such default shall be compensation for the privilege of using said harvester prior to such default." The promissory notes were executed by Rowe according to the agreement, and delivered to said Houser, Haines & Knight. The said Rowe paid the sum of $750 upon account of said notes and the purchase price of said harvester, and no more, and the balance of the $1,400, with interest, according to the terms

of said notes, remains due and unpaid. During the year 1894, the said Houser, Haines & Knight sold and assigned the said contract and the said notes to plaintiff. The contract was a conditional sale, and the title was not devested as long as the notes remained unpaid. This principle of law was decided in the early case of Kohler v. Hayes, 41 Cal. 455, and has since been followed in many cases: Hegler v. Eddy, 53 Cal. 597; Rodgers v. Bachman, 109 Cal. 556, 42 Pac. 448; Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384. It is the rule followed in the United States supreme court: Harkness v. Russell, 118 U. S. 663, 30 L. Ed. 285, 7 Sup. Ct. Rep. 51.

It follows that plaintiff was the owner of the property at the time of commencement of the action, unless it had in some manner been devested of the title. Defendant claims title by virtue of a bill of sale for a valuable consideration made to him by said Rowe on June 2, 1896. Rowe had no title at the time he made the bill of sale, but only the right to procure the title upon paying the balance of the purchase price. He conveyed that right to defendant, but neither Rowe nor defendant has paid the balance of the purchase price which Rowe agreed to pay. Hence the transfer to Rowe by defendant did not clothe him with the legal title. On June 6, 1896, the plaintiff served a notice in writing upon said Rowe, notifying him of his default in the payment of the balance of the note for the purchase price of the harvester, and of its election to terminate the contract and take possession thereof. The said written notice also tendered said Rowe the unpaid notes. Defendant further claims by virtue of having paid the assessor of Madera county $28 for said property at a public sale for delinquent taxes made June 2, 1896. The title through this source depends upon the validity of the assessment and proceedings leading up to the sale. It appears, from page 44 of the assessment-roll of Madera county for the year 1896, that under the heading "Taxpayers' Name" is the following: "Rowe, I. M., et ux., and Houser and Haines Mfg. Co., and Houser, Haines & Knight"; and under the head of "Description of Property" is the following: "Furniture, $15; sewing-machine, $5; farm utensils, $50; machinery (harvester), $350; wagon, $20; harness, $5; 10 horses, $20; 5 colts, $50; 1 cow, $20; 1 dozen poultry, $3; 3 hogs, $8." On the same page the total valuation of all the above property so assessed to the parties therein stated is given as $726. At

the bottom of the page, under the head of "Remarks," is the following: "Harvester seized for taxes and sold to R. L. Hargrove, June 2, 1896, for twenty-eight dollars, including road and poll tax." No part of the property so entered upon said assessment-roll going to make up the valuation of $726, other than the harvester, belonged to plaintiff. It was all given in to the assessor by I. M. Rowe in a sworn statement made by him April 9, 1896. After the list was so given in, the assessor, of his own volition, inserted the names, "I. M. Rowe et ux., Houser and Haines Mfg. Co., and Houser, Haines & Knight," instead of the words, "I. M. Rowe et al."

The tax due upon all the said property so assessed was $16.70, to which was added $2 for road tax and $2 for poll tax, making $20.70. To this was added $7 costs of advertising and sale, but the assessor sold for $28, in round figures. The tax rate for said county for the year 1896 was $2.30 per hundred, and the taxes due upon the harvester at this rate, and according to its assessed valuation, was $8.05. The assessment was void, and the sale thereunder conveyed no title. Personal property must be assessed to the owner or the person claiming it, or in whose possession or control it was at 12 o'clock M. on the first Monday of March next preceding the assessment: Pol. Code, sec. 3628. Without a valid assessment, all subsequent proceedings are nullities, and in making the assessment the provisions of the statute under which it is to be made must be observed with particularity. An assessment of personal property to a named person other than the owner is absolutely void: Kelsey v. Abbott, 13 Cal. 609; Smith v. Davis, 30 Cal. 537; Blatner v. Davis, 32 Cal. 328; People v. Whipple, 47 Cal. 591; Crawford v. Schmidt, 47 Cal. 618; Lake Co. v. Sulphur Bank Quicksilver Min. Co., 66 Cal. 21, 4 Pac. 876; City of San Luis Obispo v. Pettit, 87 Cal. 503, 25 Pac. 694. In certain cases where taxes on personal property are not, in the opinion of the tax collector, a lien upon real property sufficient to secure the same, the tax collector may collect them "by seizure and sale of any personal property owned by the person against whom the tax is assessed": Pol. Code, secs. 3820, 3821. In this case the personal property sold was owned by plaintiff. The taxes upon the property, with the taxes upon several other items of property, were assessed against "Rowe, I. M., et ux., and Houser and Haines Mfg. Co., and Houser, Haines & Knight." The property

was not sold for taxes due upon it alone, nor for taxes due by plaintiff, alone, but it was sold for taxes due upon property not owned or claimed by plaintiff, and given in to the assessor as the property of Rowe. It was also sold for two dollars road tax and two dollars poll tax. The corporation plaintiff certainly did not owe a poll tax. The duty of the assessor is to ascertain the name of the owner of property, and assess it to him, and, if the name of the owner is unknown to the assessor, and not of record, to assess it to "unknown owners": Pol. Code, secs. 3628, 3636. And, if it is not so assessed, the assessment is void: Grotefend v. Ultz, 53 Cal. 666; Weinreich v. Hensley, 121 Cal. 659, 54 Pac. 254.

It is urged that the rule heretofore existing in this state has been changed by section 3628 of the Political Code, and that a mistake in the name of the owner will not invalidate an assessment. The section, so far as claimed to be in point here, is: "But no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." Nothing is said about a mistake as to personal property, and the section has no application in such case: Lake Co. v. Sulphur Bank Quicksilver Min. Co., 66 Cal. 21, 4 Pac. 876; City of San Luis Obispo v. Pettit, 87 Cal. 502, 25 Pac. 649. Under this appeal, we have no power to order judgment for plaintiff on the findings, if they were such as to authorize such judgment. The order should be reversed.

We concur: Britt, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is reversed.

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## LYON v. ROBERTSON et al.

S. F. No. 1125; February 5, 1900.

59 Pac. 990.

**Promissory Note—Renewal—Consideration.—The Surrender of valid notes to one of the joint makers for cancellation is a good consideration for a new note given by him and the widow of the other maker in renewal thereof.**

**Promissory Note—Renewal.—A Widow is Liable** on her note given in renewal of prior notes to which her deceased husband was a party, though she gave it under misapprehension as to her liability for his debts, not induced by any misrepresentation by the payee.

APPEAL from Superior Court, Santa Clara County.

Action by W. P. Lyon against Aurelia Robertson and others. From a judgment for plaintiff, defendant Aurelia Robertson appeals. Affirmed.

D. W. & C. E. Herrington and H. V. Morehouse for appellants; Nicolas Bowden for respondent.

BRITT, C.—Action on a promissory note of date August 1, 1893, by the terms whereof the appellant Aurelia Robertson, then bearing the name of Orilla Chynoweth, and two others—one of whom was W. P. Lyon, Jr.—jointly and severally promised to pay to plaintiff the sum of $3,699.50. Mrs. Robertson and her present husband, who is joined with her pro forma, defend on the ground that she executed the note without consideration. Plaintiff had judgment.

At the trial there was evidence tending to show that Aurelia, or Orilla, as she was formerly called, was the wife of one Louis Chynoweth, who died May 10, 1893. Louis Chynoweth, at the time of his death, and said W. P. Lyon, Jr., were jointly indebted to the plaintiff on three certain promissory notes, by them executed, for the aggregate principal sum of $3,500, bearing interest. Said Louis and certain other persons together owned a farm and carried on the business thereof. Mrs. Robertson testified: "After his death, the partners of Louis in the business spoke of it, and treated me as if I had succeeded to his interest in the premises, and was liable for his debts as his successor, so that I believed I was liable for his debts." She executed the note in suit, and plaintiff accepted the same, upon the mutual understanding that it was "to take the place" of the said prior notes to which said deceased had been a party, and plaintiff thereupon surrendered the old notes to said W. P. Lyon, Jr., who canceled them. The court below held that the new note was supported by sufficient consideration, and we are of the same opinion. Prejudice suffered by the promisee, as well as the benefit conferred on the promisor, may be the consideration for a contract: Civ. Code, sec. 1605. There is no doubt that the

relinquishment by a creditor of a prior valid demand is a sufficient consideration for a new promise in his favor. There was such relinquishment in this case. That the old notes were delivered to W. P. Lyon, Jr., and not to the appellant Aurelia, can make no difference. Lyon, Jr., being a joint maker, both of the old notes and the new one, was entitled to receive the former when they were replaced by the latter. Nor is it of any moment that appellant may have been mistaken as to her legal relation to her deceased husband's estate or to his debts. It does not appear that plaintiff in any way contributed to her misapprehension, or even had knowledge thereof. The cases cited for appellant—Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028, Rosenberg v. Ford, 85 Cal. 610, 24 Pac. 779, and Sullivan v. Sullivan, 99 Cal. 187, 33 Pac. 862—do not support her contention. In none of them did it appear that the creditor incurred any detriment, beyond what he was already legally bound to suffer, in consequence of the wife's promise to pay the husband's debt. The judgment and order denying a new trial should be affirmed.

We concur: Chipman, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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## In re DOYLE & SON'S ESTATE.

L. A. No. 693; February 5, 1900.

59 Pac. 993.

**Insolvency.—Where, Prior to Insolvency Proceedings Against a Firm,** the wife of a member, who was also a creditor, received a draft belonging to the firm in good faith, without intending to defraud other creditors, but to keep the money from being wasted by attachments, her surrender of the principal part of the money to the assignee after an action was brought by him against her therefor, but before judgment, was in time to entitle her to share in the dividends, as a creditor free from fraud, though she contested the assignee's right to the balance of the proceeds of the draft, which she had used for family purposes.

APPEAL from Superior Court, Los Angeles County.

Judicial accounting of Gregory Perkins, assignee of the firm of D. M. Doyle & Son, insolvents. From an order allowing the claim of Lizzie R. Doyle and from an order settling the assignee's account, he appeals. Affirmed.

Dillon & Dunning for appellant; Dyer & Potter for respondent.

CHIPMAN, C.—Appeal of the assignee from an order allowing respondent's claim against the insolvents' estate and an order settling the assignee's account. It appears that Doyle & Son borrowed from the wife of Doyle, Sr., the sum of $1,500 in January, 1897, part of which the firm invested in starting a grocery business in Los Angeles. The firm sold the entire stock and fixtures March 10, 1898, for $948.90; receiving at the time $200, and on March 17th the balance, $748.90. They paid to creditors the $200, and deposited in bank, to the credit of Doyle & Son, the $748.90. Within thirty days after the sale they drew out this money, and took a New York draft for the amount, payable to the order of Mrs. Doyle, and delivered it to her. The evidence is, to some extent, directed to the intention of the parties in this transaction. Without quoting from the testimony, it appears reasonably clear therefrom that the purpose of Doyle and wife was to keep the money from being wasted by attachment suits, and to hold it for an equitable distribution among all the creditors. This is apparently the view taken by the trial court in making the orders complained of, and finds support in the evidence. After Mrs. Doyle had secured possession of the draft, the creditors, March 24, 1898, began proceedings against Doyle & Son in involuntary insolvency, in which a receiver was appointed; and on the same day he brought an action against Mrs. Doyle and her husband, D. M. Doyle, to enjoin Mrs. Doyle from converting said draft into money, and for judgment against her for the delivery of the draft or its proceeds to the receiver. The court made the order enjoining Mrs. Doyle from transferring or negotiating the draft. A stipulation was entered into by the attorneys of the respective parties agreeing that the draft should be cashed, and the proceeds be deposited with the clerk of the court, "less the sum of one hundred and fifty dollars, . . . . to be paid to the said Lizzie R. Doyle; . . . . it being understood

that the payment of the said $150, . . . . and the payment of the balance of said money into court, shall not prejudice any rights of the plaintiff herein, or her proceeding in this case, or any motion heretofore made or to be hereafter made in this case." This stipulation is not dated, but must have been entered into between March 26, 1898, and May 10, 1898. The $598.90 were accordingly deposited with the clerk. On May 10th Mrs. Doyle's attorneys served and filed notice that she relinquished all right to the fund represented by the draft "heretofore placed in her hands by D. M. Doyle, in the form of a New York draft, to wit, the sum of $748.90, for the purpose of retaining or holding until settlement with creditors of said D. M. Doyle & Son could be had—said money now being in the hands of the clerk of this court, less the sum of $150 heretofore paid over to Lizzie R. Doyle for the purpose of defraying funeral expenses, according to a certain stipulation heretofore filed—and hereby surrender the same to the receiver, Gregory Perkins, now assignee of estate of D. M. Doyle & Son." The court on May 28th indorsed on this notice the following order: "Upon foregoing stipulation, the clerk is hereby directed to pay over to the assignee or his attorney in said action the balance of the fund in his hands in said case." Again, on May 24, 1898, Mrs. Doyle's attorneys served and filed a notice, referring to the previous notice of renunciation, offering to surrender to the assignee all her right to the fund deposited with the clerk, to wit, "the sum of $598.48, or thereabouts, or any interest in any other property belonging to said insolvents." It also appeared that on the eighth day of June, 1898, the court entered judgment in the action brought by the receiver against Mrs. Doyle and her husband. In this judgment the court recited that Mrs. Doyle had turned over the $598.90, and that defendants had offered to confess judgment for $150 "on condition that plaintiff would amend his complaint by striking out certain portions thereof," and recited that plaintiff had accordingly so amended his complaint; but these stricken out portions are not stated or identified so as to enable us to point them out. Findings were waived, and the court adjudged that plaintiff recover $150 from defendant Lizzie R. Doyle, and costs, taxed at $25.50. The evidence adduced at that trial is not brought up. Mrs. Doyle filed her claim with the assignee for $1,634.46, which the assignee disallowed in his final report,

and excluded it from his account on the ground that Mrs. Doyle had obtained a preference on account of said claim within thirty days prior to the insolvency proceedings, in violation of section 50 of the insolvency act. At the hearing the evidence referred to in the early part of this opinion, relating to the money loaned by Mr. Doyle to the firm, was submitted, and also the proceedings above set forth; and the court ordered the assignee to amend his account by allowing Mrs. Doyle's claim for $1,310.21, and directing that, from the dividend to be paid her, the assignee deduct the amount of the judgment and costs ($175.50) theretofore entered against her.

Appellant's contention is that respondent received a preference in violation of the insolvent act, and that she, as a creditor, could not surrender the money received by her, and receive a dividend, unless such surrender was voluntarily made, and not as the result of adversary proceedings instituted by the assignee, and prosecuted to final judgment; citing numerous cases, and Bump on Bankruptcy. The evidence justified the court in holding that respondents acted in good faith in taking the draft, and without any intention of defrauding the other creditors. Shortly after the receiver brought his action, and some time before judgment, she surrendered all the money received by her, except $150, which the evidence tends to show she used for family purposes. In that action, however, the court gave judgment against her for this $150, reciting therein that she had turned over to the clerk the balance received by her. The court evidently, in view of the stipulations and notices already referred to, and probably in view of evidence at the trial of that action not now before us, acquitted respondent of all actual fraud in the matter, but held her liable under the insolvent act for constructive fraud alone as to the money appropriated by her. Having turned over the money to the clerk, and he to the assignee, some time before judgment, the court rightly, we think, held her entitled to share as a creditor in the dividends, first deducting from her share this $150. Respondent was entitled, under the circumstances, to avail herself of the locus poenitentiae at the time she did so, and she did not lose her right to share in the dividends because she contested the assignee's claim to the $150. We so understand the law, as stated by Mr. Bump at the page of this author's book re-

ferred to by appellant, and we find nothing to the contrary in the cases cited by appellant. In view of all the facts, we think the orders of the trial court were supported by the evidence. They certainly were fair and just, and we advise their affirmance.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the orders appealed from are affirmed.

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## WOLFSKILL v. DOUGLAS.*

Sac. No. 576; February 7, 1900.

59 Pac. 987.

**Trial.—A Finding That All the Allegations** of the complaint are true is sufficient to support a judgment, where the complaint states a good cause of action.

**Statute of Limitations—Findings.—Where a Complaint** for **Money** had and received, filed July 1, 1895, alleged that the cause of action arose "on or about January, 1894," a finding that all the allegations therein are true is an adverse finding on defendant's plea of limitations.

**Statute of Frauds—Pleading.—A Mere Reference** in a plea in bar to Civil Code, section 1624 (the statute of frauds), is insufficient as a plea of such statute.

**Appeal.—A Judgment Supported by Sufficient Findings** will not be reversed because of existence of immaterial findings not within the issues.

APPEAL from Superior Court, Yolo County.

Action by John Wolfskill against James A. Douglas. From a judgment for plaintiff, defendant appeals. Affirmed.

Bush & Ish for appellant; R. Clark for respondent.

GRAY, C.—This is an action to recover $400 alleged to have been collected by defendant from one Mary A. Black in pursuance of an agreement on her part to "refund" a cer-

*See 132 Cal. 397, 64 Pac. 704.

tain $400 previously paid out by plaintiff. On appeal no objection is made to the complaint, and it seems to be conceded that it is sufficient to support the judgment. The appeal is from the judgment alone, and the record consists of the judgment-roll only, and contains no bill of exceptions. The only reason urged for a reversal of the judgment is that the findings of the court do not correspond with the allegations of the complaint, are self-contradictory, and are in "conflict with the issues" made by the pleadings. There are two findings of fact, numbered, respectively, 1 and 2. The matter set out in the transcript headed "Findings," and purporting to be findings drawn in blank but not signed or filed, is of no significance, and will be disregarded. In finding 1 the court finds each and every allegation of plaintiff's complaint to be true. Treating the complaint as stating a cause of action—and we think it does—this finding alone is sufficient to support the judgment. It has long been held that a finding by reference to the complaint is sufficient: Johnson v. Klein, 70 Cal. 186, 11 Pac. 606; Gale v. Bradbury, 116 Cal. 39, 47 Pac. 778. The answer in the case consisted of denials of the allegations of the complaint and a plea of several statutes of limitations, and, inasmuch as the complaint was filed July 1, 1895, and shows that the cause of action set out arose "on or about the month of January, 1894," the finding may properly be treated as disposing of the plea of the statute of limitations. The reference in defendant's plea in bar to section 1624 of the Civil Code (the statute of frauds), we think must be the result of a mistake, as we find no reference in appellant's brief to such statute. But, if the reference was intentional, it is certainly insufficient as a plea of the statute of frauds, and no finding as to it was necessary. We are inclined to agree with appellant's statement that the facts referred to in the second finding "are entirely outside of the case, and have nothing whatever to do with the case"; for thus the finding appears from an inspection of the record as it now stands. Perhaps if the evidence had been brought up, it would have shown the connection. But, be that as it may, there is nothing in the second finding contradictory of the complaint or of the first finding. Everything stated in the second finding may exist just as there stated and still the allegations of the complaint be true. We may, then, treat the second finding as entirely immaterial, and regard it as sur-

plusage, and still the judgment would find support in the first finding. We advise that the judgment be affirmed.

We concur: Haynes, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## TERRILL v. SUPERIOR COURT OF SANTA CLARA COUNTY.*

S. F. No. 2120; February 16, 1899.

60 Pac. 38.

**Indictment—Validity.—Under Penal Code, Section 1008,** declaring that the judgment allowing a demurrer to an indictment is final, and a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection may be avoided in a new indictment, directs the case to be submitted to "another grand jury," where a demurrer to the indictment was sustained, but the indictment was resubmitted to the same grand jury, which found another indictment, charging defendant with the same offense, founded on the same facts, such indictment was void.[1]

**Indictment—Validity.—Where the Grand Jury Submitting** an indictment had no authority in the matter, the court is without jurisdiction.

**Prohibition—Void Indictment.—Where Defendant had Been Tried** and convicted on an indictment that was void, a writ of prohibition will issue to prevent the trial judge from pronouncing sen-

*For opinion on rehearing, see post, p. 417, 60 Pac. 516.

[1] Cited with approval in People v. Rodley, 131 Cal. 251, 63 Pac. 355, where the court show, nevertheless, that, before the defendant has been arraigned, the indictment may, with leave of the court, be sent back to the grand jury for amendment.

Cited with approval in People v. Hansted, 135 Cal. 151, 152, 67 Pac. 764, and the principle applied to a case where the defendant had entered his plea to an indictment and thereafter a second indictment by the same grand jury had been brought in, and the first dismissed, the defendant not consenting.

tence or further proceeding in the case, under Code of Civil Procedure, section 1103, providing that such writ may issue where there is no speedy and adequate remedy at law.[2]

APPEAL from Superior Court, Santa Clara County.

Application for a writ of prohibition by Samuel B. Terrill against the superior court of Santa Clara county to prevent the defendant from taking further proceedings in the case of the people against Samuel B. Terrill. Writ allowed.

Jackson Hatch, H. L. Partridge and F. C. Jacobs for petitioner.

TEMPLE, J.—This is an application for a writ of prohibition directed to the above-named court. The petition shows the following facts, which are admitted in the answer: The petitioner was regularly indicted by the grand jury of the county of Santa Clara upon a charge of forgery. Upon this indictment the petitioner was duly arraigned, and thereupon interposed a demurrer to the indictment. The demurrer having been submitted after argument, the court sustained the same in the following order: "Defendant now presents and files a demurrer to said indictment, which is argued and submitted to the court, and the court, after due consideration, orders that said demurrer be sustained and the indictment resubmitted to the present grand jury, to which the defendant excepts." Thereafter the district attorney presented the charge to the same grand jury which had found the indict-

[2] Cited and approved in Valentine v. Police Court, 141 Cal. 618, 75 Pac. 337, but held not applicable where the case has already been heard and determined on appeal, the writ of prohibition being intended for preventive relief and not as a writ of review.

Cited with approval in Primm v. Superior Court, 3 Cal. App. 210, 84 Pac. 787, where after judgment for the defendant in an attachment case, the court, by its order, had continued the attachment pending appeal.

Cited and approved in Re Hatch, 9 Cal. App. 337, 99 Pac. 400, but held to have no bearing on a case where the grievance is merely that the grand jury was irregularly impaneled.

Cited and approved in Ex parte Hayter, 16 Cal. App. 225, 116 Pac. 376, which was an application for a writ of habeas corpus, to which the principle was applied, the court saying: "The remedy by appeal is neither speedy nor adequate in a case where a citizen is restrained of his liberty under an illegal process."

ment to which the demurrer was sustained, which was then in session, and the said grand jury, on the same day, to wit, May 31, 1899, found and returned into court another indictment, charging the petitioner with the same offense, founded upon the same facts with which he had been charged in the first indictment. Afterward the defendant was duly arraigned upon the second indictment, and thereupon moved to set aside the indictment, and objected to being required to plead thereto, because the same was void, and the offense was barred by the provisions of section 1008 of the Penal Code, and for other reasons.

That the second indictment is founded entirely upon the same precise charge as the first was is not controverted. The court denied the motion to set aside the indictment, and also another motion to strike the same from the files, and defendant excepted to both rulings. Thereafter the case was brought to trial before a jury, when defendant renewed his motions with like result. Thereupon before the jury was sworn, defendant by leave of the court interposed, in addition to the plea of not guilty, a plea of former acquittal, and upon the trial proved the foregoing facts as a bar. Nevertheless, the court instructed the jury to return a verdict for the people upon said plea, which it did, and the defendant was convicted of the charge, and the court proceeded to appoint a day for pronouncing judgment upon the verdict. Petitioner avers that, unless prevented, the superior court will proceed to adjudge defendant guilty of a felony, and to sentence him to be confined in the state penitentiary. Petitioner charges that the indictment, trial and verdict are void, and the court is entirely without jurisdiction to pronounce the proposed judgment, or to sentence petitioner. Section 1008 of the Penal Code, as amended in 1880, reads as follows: "If the demurrer is allowed the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to another grand jury, or directs a new information to be filed; provided that, after such order of resubmission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases." Before this amendment, the section read as now down to the

phrase "another grand jury," except that formerly instead of this phrase it read, "to the same or another grand jury," and that the provisions as to an information were added, and also the entire proviso. The district attorney of Santa Clara county, who appeared for the respondent, contends that this amendment was made to adapt the code to the provision made in the new constitution for the prosecution of offenses by information, and that the omission of the word "same" was an unimportant inadvertence; that the important matter is that the judge has determined that the objection to the indictment can be avoided, the balance being merely directory, and means only that the charge shall be again submitted to a grand jury, or, as it now reads, to a committing magistrate, upon whose determination an information may be filed. I think, however, there was good reason for the change, and that it was deliberate. If the resubmission was not merely formal, the grand jury which found the first indictment was disqualified. The grounds upon which an individual grand juror may be challenged are stated in section 896 of the Penal Code. Subdivision 6 states one ground of disqualification. He is not qualified if his state of mind in reference to the case or to either party will prevent him from acting impartially, provided that he shall not be disqualified for having formed or expressed an opinion upon the matter to be submitted, founded upon public rumor, etc., if it satisfactorily appears that he can and will, notwithstanding such opinion, act fairly and impartially. This clearly implies, and it has always been so held, that a fixed opinion upon full knowledge will disqualify. If a defendant has been held to answer, he is brought into court, and allowed to challenge the grand jury before the charge is considered by them. If he is not in custody, he may interpose the challenge upon his arraignment. This defendant presumptively had that privilege before the first indictment. But since then the grand jury had considered the case, and had examined witnesses in regard to the charge, and had, under oath, expressed an opinion to the effect that he was probably guilty. The code provides no further opportunity for challenging the grand jury, but the jurors are plainly disqualified, and, if the resubmission is anything more than a merely formal matter, the charge cannot be resubmitted to the same grand jury. If the resub-

mission is only formal, that the indictment may be amended without a re-examination of the case and that was sufficient, a resubmission need not be had at all; but the district attorney might have been required to amend the indictment. It has never been thought that this could be done. When the demurrer was sustained, the defendant stood like any other person who had not been indicted, and is as much entitled to have his case considered by competent jurors. Perhaps, before the defendant has been arraigned, the indictment could be withdrawn, and by leave of the court sent back to the jury for amendment; but it may well be doubted whether this can be done after issue has been joined upon it, and after there has been a trial of the issue of law raised by the demurrer, and judgment has been rendered for the defendant. But, whatever we may think of the power of the court to so amend the indictment, there is enough in the proposition to furnish rational ground for amending the statute, and to prevent the conclusion that it was not intended. The indictment was, therefore, entirely and wholly void.

The question as to whether, conceding that the indictment was void, the court nevertheless had jurisdiction of the case, seems to have been determined in Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341. This is not a case where a grand jury, irregularly impaneled, acting under the semblance of right and lawful authority, but in the procedure affording every advantage to the accused he would have enjoyed had the proceedings been regular, has presented an accusation to a court having jurisdiction to try him: People v. Petrea, 92 N. Y. 128. Nor is it an irregular assemblage of men legally qualified to act, and who do act, under the control of the proper court. Here the grand jury had no authority to act at all in the matter. The jurors were not qualified to act, and that fact was a matter of record. The defendant was not allowed and did not have the advantages which he would have enjoyed before a lawful jury. He was not allowed his right of challenge to the individual jurors, although their disqualification was matter of record. Nor is it a case where the jurisdiction of the court depended upon some matter of fact which the court was authorized to determine. The court expressly ordered the charge to be resubmitted to the present jury, which its records show was the same grand jury which found the first indictment, and the grand

jury did not reinvestigate the charge, but received the new indictment from the district attorney, and, after appending the signature of the foreman, immediately presented it to the court. The intention was simply to amend the indictment, not really to resubmit the charge for re-examination. And nothing more was done.

It is suggested that the same grand jury might have reindicted the defendant, although the court had made no order of resubmission and that in such case the only mode in which the defendant could have availed himself of the bar would be to plead and prove it as a defense. In such case the presumption would be that the new indictment was for a different offense, and the question of identity could only be determined by a jury. And, besides, here the action of the grand jury was based on an illegal order.

Has the petitioner a plain, speedy and adequate remedy by appeal? It is not as obvious that the remedy by appeal is not adequate as it would have been had he applied for the writ earlier to prevent a trial. The statute implies that there may be a plain remedy which is not speedy or adequate. It is no argument, therefore, to say that the remedy by appeal is the usual one, and therefore such as the law deems adequate. Where the court is about to act without jurisdiction so as to injure a litigant, this law supposes that the remedy may not be sufficiently speedy or adequate. Certainly the remedy is not adequate, to obtain which one who has never been legally tried must first submit to be formally branded as a felon, and then languish in jail for an indefinite period, until in due time his case is reached, and this court at last shall declare that he has been outrageously treated. Unless this provision of the statute was meant for just this kind of a case, I do not know what it is for. It is therefore ordered that the said court, and the said Honorable William G. Lorigan, judge thereof, do refrain and desist from any further proceedings in the said case of the people against Samuel Terrill.

We concur: Beatty, C. J.; McFarland, J.; Harrison, J.; Garoutte, J.; Van Dyke, J.; Henshaw, J.

## HIBERNIA SAVINGS AND LOAN SOCIETY v. RUSSELL et al.

S. F. No. 1422; February 15, 1900.

60 Pac. 40.

**Judgment—Entry by Consent.—A Judgment Record Reciting that the same was ordered upon the written stipulation of defendants, consenting thereto, is conclusive of its correctness on appeal by defendants, in the absence of any bill of exceptions or other contradiction by the record.**

APPEAL from Superior Court, City and County of San Francisco.

Action by Hibernia Savings and Loan Society against Jay E. Russell and Caroline M. Russell for the foreclosure of a mortgage. From a judgment for plaintiff defendants appeal. Affirmed.

J. E. Russell for appellants; Tobin & Tobin for respondent.

PER CURIAM.—Appeal from a judgment for the foreclosure of a mortgage upon real estate. The only point in which it is contended that the judgment is erroneous is the provision therein awarding $350 counsel fees to the plaintiff. The appeal is brought here upon the judgment-roll alone, without any bill of exceptions. It is alleged in the complaint that the appellant executed to the plaintiff a mortgage to secure his promissory note for the sum of $7,135, and that the mortgage provided that in case of foreclosure the amount of five per cent thereon should be allowed the plaintiff as a counsel fee. The judgment decrees that the plaintiff recover $8,703, the amount found to be due upon the promissory note, together with $350 for counsel fees, making in all $9,053, and it is recited therein: "Said judgment is so ordered upon the written stipulation of the defendants, Jay E. Russell and Caroline M. Russell, consenting thereto, and on file herein." In the absence of any bill of exceptions or other contradiction by the record, this recital in the judgment is conclusive of its correctness, and the appellants cannot be permitted to dispute a judgment rendered upon their consent: Spinetti v. Brignardello, 53 Cal. 281; Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026; Sichler v. Look, 93 Cal. 600, 29 Pac. 220. The judgment is affirmed.

# PEOPLE v. STORKE.*

## Cr. No. 593; February 21, 1900.

60 Pac. 420.

**Libel—Witness—Impeachment.—Where a Witness** in a prosecution for libel testified that he gained access to defendant's room by climbing through a transom over the door, the testimony of one who had charge of the room and the keys thereof, as to whether or not anyone ever applied to him for access to the room, was incompetent to impeach the former witness.

**Libel—Impeachment of Witness.—Where a Witness,** on cross-examination in a prosecution for libel, testified that he went to a certain town and inquired of M. who the woman in the town was who would have been likely to have written the letters complained of as libelous, and M. answered that he knew of but one woman, testimony of M. that he did not make the statement ascribed to him by witness is inadmissible to impeach the latter, as such statement related to an immaterial and collateral matter.

**Libel—Opinion Evidence.—In a Prosecution** for libel, evidence that a witness knew that the defendant was innocent, and that she did not write the letter complained of, is incompetent, as mere opinion.

**Libel—Specimens of Handwriting.—In a Prosecution** for libel, it is not error to strike out and refuse to submit to the jury specimens of the handwriting of a person other than defendant, who has admitted his authorship of the writing stricken out, where an expert has testified that the writing in the libelous article does not resemble such writings, and there is no evidence to connect the author thereof with the writing of the libelous matter.

**Libel.—Where Testimony of Experts in Regard to the Authorship** of a libelous letter was introduced in a criminal prosecution, it was not error to refuse to instruct that the testimony of experts should be received and weighed with great caution, and that the evidence of a witness who is brought on the stand to support a theory by his opinion is testimony exposed to a reasonable degree of suspicion, which there is great reason to believe is in many instances the result of employment, and his bias arising out of it.

**Libel.—The Supreme Court will not Reverse** a conviction for libel, for refusal to give an alleged requested instruction, where the record does not show that defendant requested the court to give the instruction.

APPEAL from Superior Court, Santa Barbara County.

*For subsequent opinion in bank, see 128 Cal. 486, 60 Pac. 1090.

Yda Addis Storke was convicted of libel, and she appeals. Affirmed.

H. P. Starbuck and C. T. Currier for appellant; Attorney General Ford for the people.

COOPER, C.—The defendant was convicted of the crime of libel. She prosecutes this appeal from the judgment, and an order denying her motion for a new trial. It is conceded that the evidence sustains the verdict, and that the instructions given to the jury were correct. Defendant, however, claims that numerous errors were committed in the rejection of testimony, and the refusal of the court to give an instruction asked by defendant.

1. The defendant called one Ivison as a witness, and asked him this question: "Now, I will ask you if any application was ever made to you for permission to enter those rooms, or to give the keys to any person for the purpose of entering those rooms?" The district attorney objected to the question on the ground that it was incompetent, irrelevant and immaterial, and the objection was sustained. It is claimed that this evidence was material for the purpose of impeaching one Peraude, a witness for the people. Peraude testified that on a certain occasion, before the trial, during the absence of defendant from her rooms, witness and one Storni entered therein; that Storni lifted witness up, and he stood on top of Storni and entered through a transom window; that he then opened the door and Storni entered, and the two made a search and procured specimens of defendant's writing and some tissue paper, which articles were used in evidence during the trial. The evidence sought would not have tended to contradict the witness Peraude. Counsel has not pointed out in the evidence of Peraude that he ever said that he applied to Ivison for permission to enter the rooms or to get the keys, and we have searched the transcript in vain for any such evidence. The question asked was general, and the attention of Ivison was not called to the witness Peraude or to anyone. The ruling was correct.

2. In answer to questions of defendant's counsel in cross-examination, the witness Peraude said that he went to one Maulsby, in the town of Santa Barbara, and said: "Who is there in this town—a woman who is in the habit of writing

for the newspapers, who is a bright, smart, vindictive woman, and has something to say about everyone that is connected in any way with Winchester, and that has it in for him? And he looked at me a moment, and he said, 'I know of but one woman.' I said, 'Who is it?' 'Mrs. Storke.'" The defendant called Maulsby as a witness for the purpose of impeaching Peraude, and after reading the above extract to him, said "Now, I will ask you, Mr. Maulsby, if you so stated to the witness Peraude at the time of his interview, or at any other time." The district attorney objected to the question upon the ground that it was incompetent, immaterial and an attempt to contradict Peraude as to a collateral matter. The court sustained the objection, and defendant now argues with much apparent earnestness that the court erred in so doing, to her injury. We think the ruling correct. The answer of Peraude, concerning which it is sought to impeach him, was brought out by defendant in her cross-examination. The only thing that Peraude related as being said by Maulsby was, "I know of but one woman." Maulsby did not mention defendant's name, and said nothing against her. In answer to Peraude's description, he said that "he knew of but one woman." It seems to us that the answer of Peraude as to what Maulsby said was as to a wholly immaterial matter. That Maulsby knew of but one woman in town who answered the description given to him by Peraude was not a material circumstance. Because Maulsby knew only one such woman, we cannot presume that he referred to defendant. The rule is elementary that a witness cannot be impeached as to a collateral matter brought out in cross-examination. The statement of Maulsby was not competent evidence. It was not made in the presence of defendant and was not admissible. The defendant having asked questions of Peraude, in cross-examination, of such a nature as to elicit the answer, and not having in any way objected to it or moved to strike it out, was not afterward entitled to impeach Peraude by showing that the statement was not true.

3. It is claimed that the court erred in sustaining an objection to a question asked by defendant of her own witness, Jackson. The question was: "Do you know, Mr. Jackson, that this defendant is innocent? Do you know that this defendant did not write the letters charged against her?" The ruling of the court was clearly correct. To allow wit-

nesses for the people and for the defendant in a criminal case to testify that they knew defendant to be innocent or guilty would be to introduce a new rule into our criminal practice. The question did not ask for a fact or for any statement that could be disproved.

4. It is claimed that the court erred in striking out certain exhibits of the writing of one F. N. Gutierrez. These specimens of the writings of Gutierrez were shown to one Kytka, who claimed to be an expert in handwriting, and who had been extensively examined in regard to the alleged libelous writing and other writings claimed to have been written by defendant. Kytka testified that the exhibits of the writings of Gutierrez shown to him were not, in his opinion, the same as the libelous writings, and that there was no similarity or resemblance between them. Gutierrez was called as a witness, and identified the exhibits so shown to the expert Kytka, and admitted that they were his own handwriting. The witness Kytka had also given his opinion in regard to the alleged libelous writing, and several exhibits claimed to be in the handwriting of defendant, being People's Exhibits A to T2. Exhibit A is the writing set forth in the indictment. The bill of exceptions expressly states: "There was no evidence introduced to connect F. N. Gutierrez with the writing or publication of any of the letters or exhibits marked 'Plaintiff's Exhibits A to T2,' inclusive, or tending to show that he had any knowledge of the writing or publishing of said letters or any of them." In view of the evidence and the statement in the bill of exceptions, the exhibits were correctly stricken out. They had nothing to do with the case, and did not in the remotest degree tend to show the guilt or innocence of the defendant. The claim is made that the jury had the right to examine them and compare them with the alleged libelous writings, for the purpose of determining in their own minds whether or not the libelous writings were in fact written by Gutierrez. If this were so, it would be a strange and unheard of rule in criminal procedure. The same rule would permit the defendant to introduce every letter and every writing of every man, woman and child in Santa Barbara county, or even in the state of California, and have the jury compare the handwriting of each with the libelous matter for the purpose of determining if someone other than defendant might not have written it. The wheels of justice would be

clogged and the administration of the criminal law cease, under such rule, in all cases where a writing was the subject of the crime charged.

5. The defendant claims that the court erred in refusing to give the following instruction: "The value of expert testimony depends upon the circumstances of each case, and of these circumstances you must be the judges. You must determine the weight to be accorded to it, but in all cases the testimony of experts is to be received and weighed with great caution. The evidence of a witness who is brought upon the stand to support a theory by his opinion is testimony exposed to a reasonable degree of suspicion, which there is great reason to believe is in many instances the result of employment, and his bias arising out of it." The instruction was properly refused. Counsel might, under the latitude allowed, have used it as a part of their argument to the jury, but the court was not required to make the argument for them. As a proposition of law, the instruction is not correct; neither does it appear from the record that the defendant requested the court to give it. The court very fully and ably instructed the jury as to all propositions of law applicable to the case. The defendant appears to have offered forty-three different instructions, the greater number of which were given. They cover some fifty-five folios of the record, and many of them might well have been refused. It is not necessary to discuss the other alleged errors. We have discussed those that appear the most plausible, and, as to the others, it is sufficient to say that we have examined them and do not think that any substantial error was committed. The judgment and order should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## CARPENTER et al. v. COOK et al.

S. F. No. 1234; March 3, 1900.

60 Pac. 475.

**Trusts—Reservation of Power—Revocation by Will.**—Where a trust deed contained a reservation of power to revoke or modify the same by a deed of the grantor to be recorded in a certain city recorder's office, under Civil Code, section 2280, providing that a power of revocation reserved in a trust should be strictly pursued, the trust could not be revoked by the grantor's will.

APPEAL from Superior Court, City and County of San Francisco.

Action by E. W. Carpenter and others against E. V. S. Cook and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed, and judgment ordered for plaintiffs.

Mastick, Belcher & Mastick for appellants; T. J. Lyons for respondent Cook; John H. Durst for respondent Willey.

PER CURIAM.—This is an action to quiet title, plaintiffs resting their claims upon a deed of trust made to them by Amasa P. Willey, owner of the real estate at the time, and now deceased. The important question involved in this appeal relates to the construction and validity of various provisions of this trust deed. Those identical questions were also involved in the appeal before this court in Re Willey's Estate, 128 Cal. 1, 60 Pac. 471, and for the reasons there given the various trust provisions of this deed are now held valid. The conclusion the court has declared upon the aforesaid question of law demands a reversal of the judgment, but appellants' counsel ask not only a reversal of the judgment and order, but insist that judgment be entered in their favor upon the findings; and to this request we feel bound to accede. The findings of fact are complete, covering every necessary phase of the case, and the error committed by the trial court is found in its conclusions of law, one of which is as follows: "That the plaintiffs did not have, nor did either of them have, at the commencement of this action, or at any time since, nor has either of them now, any right, title or interest

in or to the aforesaid parcels of real property hereinbefore referred to in finding first, and in the complaint described, or to any part thereof, by virtue of the instrument designated as a 'deed of trust,' hereinbefore referred to in finding second." The aforesaid conclusion of law declared by the court, as evidenced by its opinion rendered at the time, was based upon the conviction that the deed of trust made by Willey to the trustees was subsequently revoked, or merged, or republished by the will of Willey; and whatever effect or vitality it previously had was forever lost by reason of Willey's death leaving a will subsequent to the date or the trust deed, which referred in terms to the provision in that instrument. But by inspection of section 2280 of the Civil Code we find that no revocation or merger occurred. That section provides that a trust cannot be revoked after acceptance "unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued." We find in this deed of trust the reservation of power to revoke or modify, but this reservation is limited to a modification or revocation in a certain particular way; that is, it must be done "by a deed under his hand, recorded by him in the office of the recorder of said city and county of San Francisco." The statute declares this power to revoke must be strictly pursued, and any attempt to revoke or modify the terms of this trust deed by will, therefore, must necessarily fail, as being without the reservation of power preserved by the trust deed. The provisions of the deed being valid, and there being no subsequent revocation or modification thereof, it must follow that the instrument passed title to the plaintiffs in this action. For the foregoing reasons, the judgment and order are reversed and the cause remanded to the trial court, with instructions to enter judgment upon the findings in favor of plaintiffs.

## HAMMOND v. CAILLEAUD.

S. F. No. 1157; March 13, 1900.

60 Pac. 523.

**Partition Sale.—Where in an Action to Charge Defendant** for the difference between the price bid for land by him at a partition sale and the price obtained on a resale after his refusal to accept the land, he introduced evidence which would have sustained a finding that there had been a material variance between the terms of the sales, and, after finding to the contrary, the trial court ordered a new trial generally, such order will not be reversed on appeal, since it nowhere appeared that it was not granted because such finding was contrary to the evidence.

**Partition Sale.—Though the Recitals of a Referee's Receipt** given for a sale of land at public auction on partition are not conclusive of the terms and conditions of such sale in an action against the purchaser to recover the difference between the price bid by him and the price at which the property was subsequently sold on his refusal to complete the purchase, they are admissible as tending to show the true terms and conditions thereof.

APPEAL from Superior Court, City and County of San Francisco.

Action by Richard P. Hammond, Jr., referee, against Henry Cailleaud, for breach of contract. Judgment for plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

A. C. Freeman for appellant; A. Reuf for respondent.

GAROUTTE, J.—Judgment went for plaintiff in this case and a new trial was ordered. The present appeal is from that order. A full statement of the facts giving rise to this litigation may be found in Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607. The material facts to be here considered are these: Defendant purchased certain real estate at public auction in proceedings for partition. He paid ten per cent at the time of the sale, and upon confirmation of the sale by the court refused to take the deed, and pay the balance of the purchase price. Thereupon a second sale was ordered by the court, and made to the other parties, and the present action is brought to recover from the defendant the

difference between the respective amounts of the first and second purchase price. It was decided upon the former appeal in this case (Hammond v. Cailleaud, supra) that, in order to establish a liability against this defendant, it must be shown that the second sale was held, in all substantial respects, upon the same terms and conditions as the first sale. It was further held that, notwithstanding the real estate was confirmed to defendant, under his purchase, against his objection, and he did not appeal from such decree of confirmation, still the terms and conditions under which he purchased could be shown by parol evidence for the purpose of establishing that these terms and conditions were not the same as those which governed the second sale. In view of the decision of this court as to these matters upon the previous appeal, which decision forms the law of the case at the present time, evidence was offered at the trial in the superior court tending to show a material difference between the terms and conditions of the first and second sales. This evidence was sufficient to have supported a finding of fact to that effect, yet findings of fact were made to the contrary. In this state of the case the trial court granted the motion for a new trial in general language; and, in view of the evidence to which we have just adverted, it is impossible for this court to know but that the new trial was granted upon the ground that the aforesaid finding of fact was contrary to the evidence. Under these circumstances the order granting the new trial cannot be reversed. As to the receipt given defendant by the referee, the plaintiff herein, soon after the sale, even conceding that its recitals are not conclusive evidence of the terms and conditions of the sale, still, beyond any doubt, those recitals are some evidence tending to show the true facts as to the terms and conditions of the sale to defendant. For the foregoing reasons, the order is affirmed.

We concur: Harrison, J.; Van Dyke, J.

## FRANK v. CHATFIELD.

S. F. No. 1440; March 13, 1900.

60 Pac. 525.

**Real Actions—New Trial.—Where, in an Action to recover land held by defendant under a contract of purchase, he did not question the finding that he had failed to perform conditions, for breach of which the contract was to be void, and which were of the essence of the contract, on a motion for a new trial such motion was properly denied.**

**Real Actions.—Though the Pleadings and Findings of a trial court do not support a judgment for rent of demanded premises, such question cannot be raised on an appeal from its order denying a new trial.**

APPEAL from Superior Court, Santa Clara County.

Action by Jane Margaret Frank against Thomas F. Chatfield for the recovery of land. Judgment for plaintiff. From an order denying a new trial defendant appeals. Affirmed.

J. H. Campbell for appellant; Henry H. Davis for respondent.

BRITT, C.—On June 4, 1895, the persons now parties to this action entered into a contract in writing whereby plaintiff agreed to sell, and defendant agreed to buy, certain land in Santa Clara county. By the terms of the contract, credit was allowed for the greater part of the purchase price until September 15, 1897; but it was provided that defendant should have immediate possession of the land, and pay plaintiff, as rental for the same, the sum of $600 per annum pending completion of the purchase—the second annual installment of rent to be payable on September 4, 1896. It was further stipulated that time was of the essence of the contract, and that if defendant should fail to make the payments provided for when due, or within thirty days thereafter, then plaintiff might retake possession of the premises, and the contract should be void. Defendant was let into possession of the land as agreed. On October 31, 1896, plaintiff commenced this action to oust him therefrom. She demanded,

also, judgment for the value of the use and occupation of the premises at the rate of $1,000 per year after June 4, 1896. In his answer defendant pleaded said contract with plaintiff, and averred that he entered under its terms, and that he has performed all the conditions thereof on his part to be performed. At the trial there was evidence tending to show that the sum of $600 which fell due for rent on September 4, 1896, has not been paid, and the court so found. Other findings were made, and the court rendered judgment that plaintiff recover possession of the land, and also recover the sum of $600 "found due as the annual rental of the premises . . . . for the year commencing June 4, 1896." The appeal is taken from an order denying defendant's motion for new trial.

As concerns the decision touching possession of the land, no plausible reason for reversing the order has been suggested to us. The effect of the answer is to admit that plaintiff is entitled to re-enter if defendant has not complied with the conditions of the contract on which his right to possession depended. The court found that he did not comply with his agreement to pay rent for the second year, and the sufficiency of the evidence to support the finding is not questioned in argument. An effort is made to show that the pleadings and the findings do not support the judgment, and it is very doubtful whether they do sustain that part of the same allowing the recovery of $600 for rent of the demanded premises. The record is confused to a degree. But defendant has not appealed from the judgment, and questions whether it regularly follows the pleadings or the findings cannot be raised on an appeal merely from the order denying a new trial: Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Brison v. Brison, 90 Cal. 323, 27 Pac. 186. The order appealed from should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

## ARNETT v. SUPERIOR COURT.

S. F. No. 2224; March 13, 1900.

60 Pac. 534.

**Prohibition.—Where a Judgment in a Criminal Case was Reversed,** and the case remanded for new trial, a writ of prohibition will not issue to prohibit such retrial on the ground that it appeared from the record that the jury before whom defendant was once tried was discharged without a verdict, without his consent and without necessity, and that consequently he had once been in jeopardy, since the remanding of the case for new trial was the final law on appeal, and defendant could make his defense of former jeopardy by plea on the trial.[1]

Petition by one Arnett for writ of prohibition to the superior court to prohibit his retrial on an information charging him with assault with intent to murder. Denied.

E. V. Spencer and H. D. Burroughs for petitioner.

PER CURIAM.—This is an application for a writ of prohibition. The petitioner was tried upon an information charging him with the crime of assault with intent to murder. The jury returned a verdict of guilty of assault with a deadly weapon, and judgment was entered accordingly. On appeal to this court the judgment was reversed upon the ground that the conviction was of an offense not charged in the information, and the cause was remanded for a new trial: 126 Cal. 680, 59 Pac. 204. The superior court has set the cause down for trial, and we are asked to prohibit a retrial upon the ground that it appears from the record that the jury before whom petitioner was once tried was discharged without a verdict, without necessity and without his consent; the result being, as he contends, that he has been once in jeopardy, and the court has no jurisdiction to try him again. But it is the law of the case that he must be tried again, that being the final judgment of this court on the appeal. If he has been once in jeopardy, he must make that defense by plea when the case is retried. Writ denied.

[1] Cited in the note in 111 Am. St. Rep. 935, 952, 957, on the writ of prohibition.

## TERRILL v. SUPERIOR COURT OF SANTA CLARA COUNTY.*

S. F. No. 2120; March 17, 1900.

60 Pac. 516.

**Indictment — Validity — Statutes — Amendment.**—Penal Code, section 1008, declares that if a demurrer to an information or indictment is allowed, the judgment is final, and a bar to another prosecution, unless the court directs the case to be submitted to "another grand jury." Prior to 1880 the act read, "the same or another grand jury." Held, the words were omitted ex industria, and a submission to the same grand jury was error.

On rehearing. Denied.

BEATTY, C. J.—A rehearing of this case is denied. A comparison of the various sections of the Penal Code cited in the petition for rehearing, which have been amended by the legislature to adapt them to the constitutional provision and statutes authorizing prosecutions by information, warrants a conjecture that the omission of the words "the same or" from section 1008 was, in point of fact, the result of inadvertence. But we are at the same time convinced that we cannot change the law upon a conjecture, however probable, that it contains a provision which the legislature did not intend to insert. We must take the law as it is plainly written, and, if it is mandatory in its terms, we cannot treat it as merely directory. This law says that if the demurrer is allowed, the judgment is final upon the indictment, and is a bar to another prosecution, unless the court directs the case to be submitted to another grand jury; and the very fact that the court in other cases is authorized to submit the case to the "same or another" grand jury requires us to hold, upon accepted rules of construction, that the words "the same or" in this connection were omitted ex industria. To put them back into the statute would be an act of legislation.

We concur: Henshaw, J.; Harrison, J.; Garoutte, J.; Van Dyke, J.

*For former opinion, see ante, p. 398, 60 Pac. 38.

## BANK OF NATIONAL CITY v. JOHNSTON.*

L. A. No. 601; March 24, 1900.

60 Pac. 776.

**Corporation—Meetings of Directors—Notice.**—Where, in the absence of by-laws fixing the times for meetings of directors of a corporation, all of the directors, being duly assembled, agree to adjourn to a date and hour named, a meeting held by a majority of the directors at the time thus fixed is a legal meeting of the board, though no personal notice of the meeting is given to each director; and the acts of such meeting will be valid, under Civil Code, section 308, providing that every decision of a majority of the directors, made when duly assembled, is valid as a corporate act.

**Corporation—Adjourned Meeting of Directors—Assessments.**—In the absence of any limitation imposed by statute or the articles of incorporation or by-laws of a corporation, requiring the object of a special meeting to be stated in the notice therefor, a board of directors, duly assembled at an adjourned meeting, may resolve to proceed by action for the collection of an assessment upon stock, as provided in Civil Code, section 349, where the resolution levying the assessment fixed a day when unpaid assessments would become delinquent, and the time for payment has expired.

**Appeal.—Where Defendant Answers Over After Demurrer to the Complaint** is overruled, and no appeal is taken, he cannot, on the appeal of plaintiff from a judgment in defendant's favor, insist upon affirmance upon the ground that his demurrer should have been sustained.

APPEAL from Superior Court, San Diego County.

Action by the Bank of National City against one Johnson to recover the amount of an assessment on shares of stock in a corporation. From a judgment for defendant, plaintiff appeals. Reversed.

Haynes & Ward for appellant; G. H. P. Shaw for respondent.

HARRISON, J.—The plaintiff seeks by this action to recover the amount of an assessment upon certain shares of its capital stock held by the defendant. The resolution levying the assessment was adopted September 8, 1896, and it fixed October 30th as the day on which unpaid assessments should

*For subsequent opinion in bank, see 133 Cal. 185, 65 Pac. 383.

be delinquent, and November 25th as the day for the sale of delinquent stock. The only issue presented by the answer is upon the allegation in the complaint that the plaintiff elected, by virtue of section 349 of the Civil Code, to proceed to recover the assessment by action. Judgment was rendered in favor of the defendant, from which, and from an order denying a new trial, the plaintiff has appealed.

It was shown at the trial that at a meeting of the stockholders in 1888 certain by-laws were unanimously adopted, and that the minutes of this meeting containing said by-laws were copied into a book labeled on its back, "Record—The Bank of National City," and kept in the office of the corporation, but that the by-laws were not otherwise certified to by any officer, or copied into any other book; that said book has since that date been used for the record of the permanent minutes of the meetings of the stockholders and of the board of directors of the corporation; and that the record of said by-laws in said minutes has always been regarded by the stockholders and officers of the bank as the only book of by-laws thereof. One of these by-laws provides, "A stated meeting of the board of directors shall be held on the second Tuesday of each month at the bank, at such hour as may be designated by the president." In May, 1888, the board of directors adopted a resolution that its regular monthly meeting should be held on the second Tuesday of each month, at 10 o'clock A. M.; and since that time all the meetings of the board have been, by usage and custom, convened at that hour, unless a different hour for any particular meeting was specially appointed. The minutes of the board of directors of October 13th, which was the second Tuesday of that month, recited that a regular meeting was held that day, at which five directors were present, and that after transacting certain business the meeting adjourned for one week. The minutes also show that on October 20th an adjourned meeting of the board of directors was held, at which all of the directors were present, and at the close of its business it adjourned for one week; that on October 27th an adjourned meeting of the board was held, at which all of the directors were present; and that at its close it "adjourned to next Saturday, October 31st, at 9 o'clock A. M." The minutes of October 31st recite: "At an adjourned meeting of the board of directors of the Bank of National City held this day there were present"

(naming five directors). At this meeting there was adopted, by the unanimous vote of all the directors present, a resolution electing to proceed by action to recover the delinquent assessments, one of which was upon the stock of the defendant. No order was signed or given by the president or secretary calling either of these meetings, nor was there any special notice thereof in writing, or any written notice given to any of the directors, other than such as appears upon the face of the minutes.

It is contended by the respondent that under the provisions of section 304 of the Civil Code, and because of the failure of the plaintiff to have the by-laws adopted by the stockholders certified and copied as required by that section, none of said by-laws ever took effect or had any validity; that as there is no by-law which makes provision for regular meetings of the directors, or the mode of calling special meetings, under section 320, all meetings must have been called by special notice in writing given to each director by the secretary on the order of the president; that, as such notice was not given, the board of directors at which the resolution to collect the assessment by action was adopted was not "duly assembled," and the resolution itself has no validity. It may be conceded that by reason of the provision in section 304 of the Civil Code, the by-laws adopted in 1888 did not take effect, but it does not follow that the directors of the corporation were thereby precluded from themselves determining the days upon which they would hold regular meetings. By section 305, the corporate powers of all corporations are to be exercised by the board of directors, who, under section 308, are to organize immediately after their election, and are required to perform the duties enjoined on them by law. The same section declares, "A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act." The provision of section 320, for calling meetings "when no provision is made in the by-laws for regular meetings of the directors, and the mode of calling special meetings," implies that the stockholders may omit to adopt by-laws upon these subjects, and that the directors may themselves fix the time at which their regular meetings shall be held. In the absence of any statute on the subject, it would

be requisite to give to each director a notice of the time at which any special meeting should be held. The statute declares who shall have the authority to give such notice, but this provision does not prevent the entire body of directors from holding a meeting in accordance with their previous agreement. If all are present under such agreement, the board will be "duly assembled," and their exercise of the corporate powers will be valid. Mr. Thompson, in his treatise on Corporations, says (volume 7, section 8486): "The general rule that all the directors of a corporation are entitled to notice of any meeting at which any corporate business is to be transacted 'yields to the principle that the failure to give notice is waived or rendered of no importance—in whatever way it is regarded—where, notwithstanding the want of notice, all the directors meet and consult and participate in the business of the meeting,' and to the further principle 'that where a meeting is regularly assembled, but adjourns to a future time and place, special notice of the adjourned meeting is not necessary, since the fact and record of the adjournment give such notice.'" Whether the meeting of October 13th is to be regarded as a stated meeting or not, or whether the meetings of October 20th and October 27th are to be regarded as adjournments of that meeting, or as special meetings, is immaterial in the present case. At each of the two last meetings all of the directors were present, and the meetings fall within the principles stated above by Mr. Thompson. The adjournment by all of the directors from October 27th to October 31st was an agreement between them to meet on that day, and dispensed with the requirement for any further notice. In Whitehead v. Rubber Co., 52 N. J. Eq. 84, 27 Atl. 897, the vice-chancellor said upon the same question: "If all the directors had been present at any meeting, and had agreed to an adjournment for the purpose of considering the question now before us, the result of their deliberations would have been sustained." In Minneapolis Times Co. v. Nimocks, 53 Minn. 381, 55 N. W. 546, the court said in reference to this proposition: "If it was the fact that the special meeting of the directors which made the assessment was not called upon notice, as provided in the by-laws, it is wholly immaterial, for the reason that all the directors were personally present and participated in making the assessment. The only object of notice is that the directors have

an opportunity of being present at the meeting, and taking part in its proceedings."

The board of directors was therefore "duly assembled" at its meeting on October 31st, and as a majority of the board were then present, and adopted the resolution to proceed by action for the collection of the delinquent assessments, such resolution was, under section 308 of the Civil Code, "valid as a corporate act." The board was not limited at that meeting to the consideration of matters which had been left unfinished at the former meeting, or to matters which by reason of extrinsic conditions could not then have been considered. There is no requirement in any by-law of the corporation, or in the statute, which imposes any limitation upon the business to be transacted at a special meeting, or which requires the object of a special meeting to be stated in the notice therefor, and in the absence of such requirement the notice need not state the object: Granger v. Mining Co., 59 Cal. 678; In re Argus Co., 138 N. Y. 578, 34 N. E. 388. Whatever corporate action upon any subject could be taken on that day was within the consideration and decision of the board, and its action thereon was effective as a corporate act. By the original resolution in levying the assessment, October 30th had been fixed as the day on which the unpaid assessment would be delinquent, and under section 349 of the Civil Code, the board was authorized "at any time subsequent thereto" to elect to proceed by action. It is not disputed that a meeting could have been called by express notice for that day for the purpose of adopting such resolution, but, as the meeting which was held on that day was as fully authorized as if it had been called by such notice, its acts and resolutions are entitled to the same consideration. The board of directors which holds a special meeting, called for the purpose of transacting certain specified business, may not be authorized to transact any other business at an adjourned meeting thereof; but, if there is no limitation upon the business which the board is authorized to transact at the special meeting, it may transact any business at an adjournment of that meeting, whether it was partly considered at the original meeting, or whether the opportunity or occasion for its consideration has arisen since the adjournment. "If it was a legal meeting, they had the right to pass any resolution and take any action which did not violate the law of their organization, or

exceed the powers with which, as a corporate body, they were invested": Smith v. Law, 21 N. Y. 296. See, also, Western Imp. Co. v. Des Moines Nat. Bank, 103 Iowa, 455, 72 N. W. 657.

The defendant filed a demurrer to the complaint, which was overruled, and he thereupon answered the complaint; and, upon the trial of the issues thus raised, judgment was rendered in his favor. It is now urged by him that the judgment should be affirmed upon the ground that his demurrer should have been sustained. As he did not, however, appeal from the action of the court in overruling his demurrer, that action is not here for review. The cause was tried upon the theory that the plaintiff's right of recovery depended upon the validity of its resolution to proceed by action, and, aside from this resolution, the sufficiency of the complaint was not made the basis of the judgment, nor did it enter into the issues before the court. If the court had sustained his demurrer, the plaintiff might, under its order, have amended its complaint so as to obviate the objection thereto, whereas, if we should now affirm the judgment upon the ground that the demurrer should have been sustained, the plaintiff would be remediless. The judgment and order are reversed.

We concur: Garoutte, J.; Van Dyke, J.

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## O'DONNELL v. MERGUIRE et al.*

S. F. No. 1346; March 31, 1900.

60 Pac. 981.

**An Execution Signed by a Deputy Clerk for a Clerk** of the court, whose term expired several months prior to the issuance of the execution, is void, under Code of Civil Procedure, section 682, declaring that an execution shall be sealed with the seal of the court and subscribed by the clerk; and a purchaser at a sale had under a levy based on such execution acquires no title to the property, so as to enable him to question a conveyance thereof by the judgment debtor, as fraudulent.

*For subsequent opinion in bank, see 131 Cal. 527, 131 Am. St. Rep. 389, 63 Pac. 847.

APPEAL from Superior Court, Alameda County.

Action by Delia T. O'Donnell against J. H. Merguire and others. Judgment was rendered in favor of plaintiff, and from an order granting defendants a new trial plaintiff appeals. Reversed.

Reed & Neusbaumer for appellant; Chas. W. Reed for respondents.

TEMPLE, J.—This is an action to quiet title. The plaintiff had judgment, and on application of defendants a new trial was granted. The appeal is from that order. The defendants claimed title through an execution sale under what is claimed to have been an execution against Thomas O'Donnell, husband of the plaintiff. Plaintiff derived her title through a deed of gift from her husband, which the defendants contended was fraudulent as to creditors of Thomas O'Donnell. The new trial was asked for upon all the statutory grounds, and, among them, for the alleged error of the court in admitting in evidence the judgment-roll, execution and sheriff's deed under which the defendants claim. The particular objection to the execution was that it was not subscribed by the clerk. The execution bears date April 6, 1895, and is attested thus: "Attest my hand and seal of said court the day and year last above written. M. C. Haley, Clerk, by B. Dougherty, Deputy Clerk." The term of M. C. Haley as county clerk ended several months prior to this date, at which time C. F. Curry was county clerk. Section 682 of the Code of Civil Procedure prescribes that an execution shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk. The "test," as it has been understood, is not required. Under these code provisions, every execution must be subscribed by the clerk. No other mode is provided for its authentication, and without it there can be no writ of execution. It is mere waste paper. Respondents submit a list of authorities which they contend support the view that the execution is not void, although not signed by the clerk. That may be true where the writ is otherwise authenticated, as it is in New York and many other states where execution must be signed by the party in whose favor it is issued, or, as said there, by the party who issues it. If so signed, it is not void, although not authenticated

by the clerk. Such a document could not be regarded as a writ in this state. Upon this subject, see Munis v. Herrera, 1 N. M. 362; Purcell v. McFarland, 23 N. C. 34, 35 Am. Dec. 734; Huggins v. Ketchum, 20 N. C. 550; Wooters v. Joseph, 137 Ill. 113, 31 Am. St. Rep. 355, 27 N. E. 80.

It is not shown by independent evidence that Dougherty was or was not the deputy of Haley during his term of office, or of Curry. We cannot disregard the form of the signature, which implicitly asserts that he was acting as the deputy of Haley. His signature, then, if recognized at all, must be regarded as the signature of Haley, and, of course, cannot be the signature of Curry. In this respect the signature is much worse than it would have been if no principal had been named. It might then have been argued that he was deputy of the county clerk, whoever he was. Whether that would have been sufficient to prevent a conclusion that the writ was absolutely void need not be considered. I think the execution was absolutely void, and therefore it is of no importance in this case whether the conveyance from Thomas O'Donnell was fraudulent or not. Order reversed.

We concur: McFarland, J.; Henshaw, J.

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## McCORMICK v. GROSS.*

Sac. No. 716; April 6, 1900.

60 Pac. 858.

**Sale.—Where, in an Action for the Purchase Price** of certain fixtures, defendant denied the purchase as alleged, and the evidence on such issue was squarely in conflict, a verdict in favor of defendant will not be reversed on appeal.[1]

**Sale.—Where, on Trial of an Action for the Purchase Price** of fixtures, defendant denied the sale, and testified that he made no claim to the property, and that plaintiff could have it at any time, the fact that, after verdict in his favor, defendant refused to

*See 135 Cal. 302, 67 Pac. 766.

[1] **Cited** in McCormick v. Gross, 135 Cal. 303, 67 Pac. 767, as having disposed of points in the case other than the sole one then before the court.

deliver the property, except on onerous conditions, did not entitle plaintiff to a new trial on the ground that defendant's evidence was a gross irregularity in the proceedings, and that his refusal to deliver was a surprise justifying a new trial.

APPEAL from Superior Court, San Joaquin County.

Action by Margaret McCormick against John E. Gross. From a judgment for defendant, plaintiff appeals. Affirmed.

Louttit & Middlecoff for appellant; Nicol & Orr for respondent.

PER CURIAM.—This is an action to recover $1,000, as the agreed price for the sale of certain property, consisting of buildings, a pair of scales, refrigerator, a cold-storage plant, one tank and frame, etc. The case was tried with a jury, and the verdict was for defendant. From the judgment, and an order denying a new trial, the plaintiff has appealed.

Plaintiff held the lease of certain butcher-shops and the premises pertaining thereto. The defendant was the lessor. The lease was for a period of five years, with the privilege of a further term of five years. It also provided that the lessee should have the right to remove from the premises all improvements placed thereon during the term. She placed certain improvements thereon. It is now claimed that plaintiff sold these improvements to defendant, and this action is brought to recover the purchase price. The evidence as to the sale is squarely conflicting, the agent of plaintiff testifying directly to the sale, and defendant himself testifying to the contrary. His evidence is to the effect that he agreed to give $1,000 for this property if plaintiff gave up possession of the premises at the expiration of the five year term. It also appears that plaintiff held possession thirteen months after the expiration of this term. For this reason he insists there was no sale. We are entirely satisfied upon this condition of the evidence that the question of sale or no sale was a pure question of fact for the jury to decide, and we cannot interfere with the verdict upon that ground.

At the trial defendant testified that he made no claim to the property, and that plaintiff could have it at any time, and that all he asked was to have the plant placed in the condition it was when the lessees took possession. A few days after the verdict was rendered in his favor plaintiff

demanded possession of the property, which demand was refused by defendant, except upon certain conditions, which conditions were somewhat onerous. Thereupon plaintiff moved for a new trial, setting up this demand and refusal as ground therefor, claiming, first, that the conduct of the defendant in giving this evidence before the jury, and then refusing, upon demand, to make good his statements, was a gross irregularity in the proceeding; and, secondly, insisting that his conduct in refusing to deliver up possession of the property upon plaintiff's demand was a surprise to her, which justified a new trial. No authority is cited to support either of these propositions, and we are satisfied that both contentions are unsound. Neither position taken by appellant furnishes a statutory ground upon which to support a motion for a new trial. There is no substantial merit in the appeal, and for the foregoing reasons the judgment and order are affirmed.

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## REAVIS v. GARDNER et ux.

S. F. No. 1246; April 13, 1900.

60 Pac. 964.

**Ejectment.—Findings That the Original Owner of Land Conveyed** the same to her daughter, reserving in such conveyance an estate for life, and that later the same grantor conveyed the same premises by deed of gift to another daughter, are not conflicting, since the latter conveyance should be understood to mean a conveyance of the life estate, only, then remaining in possession of the grantor.

**Ejectment.—That Findings of Fact Do not Determine** the ultimate fact of ownership of property in controversy is not material, where successive conveyances from the source of title to the plaintiff are found.

**Marriage.—It cannot be Conclusively Presumed** that a woman was married in 1889, at the time of receiving a grant of land, from proof of coverture in 1891, 1893 and 1897, and that in 1897 a son of the same name as her supposed husband commenced a suit, and was presumably of full age.

APPEAL from Superior Court, Napa County.

Action by David M. Reavis against G. F. Gardner and wife for ejectment. From a judgment for plaintiff, defendants appeal. Affirmed.

H. M. Barstow for appellants; Linforth & Whittaker, F. E. Johnson and Jas. Alva Watt for respondent.

BRITT, C.—The action is ejectment for a lot of land in Napa City. It is alleged in the complaint, in the usual manner, that plaintiff is owner of the land, and the allegation is denied by the answer. Both plaintiff and the defendant Dora L. Gardner claim to deraign title from one Nancy J. Hill. The trial was by the court without a jury, and among the findings of fact are the following: (1) That on January 28, 1889, said Nancy J. Hill was the owner in fee of said land, and on that day "conveyed the same, by a deed of grant, bargain and sale, to Ann E. Reavis; reserving in such conveyance an estate for her life in the premises." (2) That on April 21, 1891, said Nancy J. Hill "conveyed the demanded premises, by a deed of gift, to the defendant Dora L. Gardner," for the consideration of love and affection; said Dora being a daughter of said Nancy J. Hill. Said Ann E. Reavis is also the daughter of Nancy J. Hill. (3) That Nancy J. Hill died June 2, 1892. That on December 27, 1892, Ann E. Reavis made a deed of the premises to one Nellie Holt, and on November 10, 1894, said Nellie Holt executed a deed of the same to plaintiff. Upon these and some other findings, not necessary to be stated, judgment was rendered for the plaintiff.

On appeal the defendants argue that findings 1 and 2 are in conflict; that they represent the grantor as conveying the land twice—first to Ann E. Reavis and afterward to the defendant Dora. But understanding the findings, as we must, in their relations among themselves as a connected whole, and in the sense which will sustain rather than defeat the judgment (for that is the sense in which the court below doubtless meant them), there is no necessary conflict. The finding of a conveyance of the premises by Nancy J. Hill to Ann E. Reavis shows that a life estate was reserved to the grantor. The further finding of a conveyance by deed of gift to Mrs. Gardner should be understood to refer to the conveyance of the life estate the grantor had then remaining in the premises—a title

which was determined by her death, on June 2, 1892. In this view, the finding of the death of Nancy J. Hill serves a purpose, and is material; for it shows that the interest reserved to her in the deed of January, 1889, and which passed to Mrs. Gardner by the deed of April, 1891, has ceased. But the circumstance of her death was wholly immaterial, if the court had meant to decide as a fact what the words in said finding 2, standing alone, import, viz., that on April 21, 1891, the premises were conveyed absolutely to Mrs. Gardner. We ought not to assume that the court has made any superfluous finding.

A further point made in this connection is that the findings do not respond to the issue of ownership raised by the pleadings. It is true, the ultimate fact of ownership is not found, but successive conveyances from the source of title to the plaintiff are found, and this is sufficient in such cases as the present: Kidder v. Stevens, 60 Cal. 414; McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14.

The plaintiff, whom we may suppose to be a person of full age, is the son of said Ann E. Reavis. It appeared in evidence at the trial, though in an incidental way, that in the years 1891 and 1893, and also at the time of the trial, in 1897, said Ann was the wife of a man of the name of Reavis. From these facts defendants contend that it is to be presumed that she was a married woman on January 28, 1889, the time she received the deed from Nancy J. Hill. Hence defendants say, under section 164 of the Civil Code, as it stood at that time, the land became community property of said Ann and her presumptive husband; that she was incompetent to convey it, and her deed thereof to Nellie Holt, the immediate grantor of plaintiff, was void; citing Jordan v. Fay, 98 Cal. 264, 33 Pac. 95. This question was not raised at the trial. If it had been, perhaps the evidence would have been more definite. To sustain defendants' contention now, on the evidence in the record, would be to hold that the presumption of continuing coverture operates retrospectively from the time the fact of coverture is shown to exist, which is not the law. See various illustrations in Lawson's work on Presumptive Evidence (page 238, second edition). The circumstance that Mrs. Reavis has a son named Reavis, the plaintiff, who must have been born long prior to January 28, 1889, does not conclude the matter. She may have been a

widow at the date last mentioned, and have subsequently married a man of the same name as herself. The judgment and order denying a new trial should be affirmed.

We concur: Cooper, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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## GREENWOOD et al. v. HASSETT et al.

S. F. No. 1567; May 14, 1900.

61 Pac. 173.

**Street Improvement.—A Complaint in an Action to Foreclose** a street assessment lien is sufficient though it fails to set forth the specifications attached to and forming a part of the contract for the work.

**Street Improvement—Notice of Resolution of Intention.—** Street improvement act, section 3, requires that the notice of the passage of the resolution of intention to make street improvements shall be posted along the line of work, after it has been posted for two days on the door of the council chamber. Held, that the posting of such notice on the council chamber door on the sixth day of the month was completed on the seventh, and hence a posting thereof along the line of work on the eighth was proper.[1]

APPEAL from Superior Court, City and County of San Francisco.

Action by one Greenwood and others against one Hassett and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

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[1] **Cited** in Gay v. Engebretsen, 158 Cal. 27, 139 Am. St. Rep. 67, 109 Pac. 879, with other cases as showing that, the question being on the resolution of intention and the necessity of publishing it, such publishing is a statutory prerequisite of the council ordering the work done and of the street superintendent posting notices of street work; it being otherwise with the publication of the resolution ordering the work to be done. This need not be fully effected before a call for bids is made.

James F. Tevlin for appellants Hassett & Grant; T. Z. Blakeman for appellant Moran; F. M. Purcells for respondents.

PER CURIAM.—Action to foreclose the lien of a street assessment. The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and, the defendants having answered, the cause was tried by the court, and judgment rendered in favor of the plaintiffs. The defendants have appealed.

The demurrer to the complaint was properly overruled by the court.

1. It was not necessary to set forth in the complaint the specifications attached to the contract, and which formed a part thereof: California Improvement Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

2. The objection that there is no sufficient allegation of a demand upon the lot has been obviated by the stipulation filed herein correcting the transcript as originally printed.

3. The notice of the passage of the resolution of intention was properly posted by the superintendent of streets. The complaint alleges that the clerk of the board of supervisors on the sixth day of December, 1893, posted the resolution of intention, and kept the same so posted for two days, and that on the eighth day of December, 1893, the superintendent of streets caused notices of the passage of said resolution to be conspicuously posted along the line of the work. The provision of section 12 of the Code of Civil Procedure is not applicable. Section 3 of the street improvement act does not prescribe the time "in which" the posting is to be made, but declares the time at which the superintendent is to make the posting; i. e., after the posting by the clerk. In the present case, the posting for "two days" by the clerk was completed at the close of December 7th. In Savings etc. Society v. Thompson, 32 Cal. 347, where the statute required the publication of a summons for three months, and the first publication was made on the 10th of January, it was held that a publication for three months was completed at the close of April 9th. In Himmelmann v. Cahn, 49 Cal. 285, it was held that the statute requiring the notice of award to be posted for five days was satisfied by including both the first and last

day of its posting: See, also, Wilson v. His Creditors, 55 Cal. 476; Dean v. Grimes, 72 Cal. 442, 14 Pac. 178.

4. The evidence sufficiently showed that the engineer's certificate had been properly recorded: Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772. The judgment is affirmed.

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## STEWART v. CALIFORNIA IMP. COMPANY et al.

S. F. No. 1544; May 21, 1900.

61 Pac. 280.

**Municipality—Liability for Personal Injuries.—A City Hired from an Improvement Company** the use of a steam roller and engineer. The city had full control over the movements of the steam roller, and directed its engineer where to operate it. The company paid the salary of the engineer, and had the power to discharge him. The roller, being directed to operate where the ground was too soft to hold it up, sank in the mud, and the engineer, in a proper exercise of his duties, put on full steam, and extricated the roller from the mud. The steam then escaped with a loud noise, and frightened the horse of a traveler, who was permitted by the city's superintendent to approach without warning, injuring him. Held, that the city was liable therefor, and not the company.

APPEAL from Superior Court, Alameda County.

Action for injuries by M. G. Stewart against the California Improvement Company and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Edward J. Pringle and Wm. B. Pringle for appellants; Chickering, Thomas & Gregory and B. C. McFadden for respondent.

CHIPMAN, C.—The trial was by the court without a jury. The court found that defendant Conger was, on March 4, 1896, employed by his codefendant, the company, "as engineer to manage a steam roller then owned by said company, and used by it in rolling and leveling streets. The said steam roller was then in the use of the city of Oakland; the same, with the engineer in charge, having been hired by the city of Oakland from the defendant," the company. The

company "had selected the said engineer, his services were paid for by said company, and said company had the right to remove him. The relation of master and servant existed between the defendant California Improvement Company and the defendant Conger, and not between the city of Oakland and the defendant Conger." Appellant contends that, if there is any liability for the accident, it is from the city of Oakland, and not from the company. As this question lies at the threshold of the case, it should first be determined. The evidence on the subject was as follows: The witness Miller, superintendent of streets for the city of Oakland, testified: "The roller was in the employ of the city of Oakland the day of this accident. It was hired from the California Improvement Company. Mr. Sherman, my foreman, had charge of the work, together with myself." On cross-examination the following question and answer occurred: "Q. Did Mr. Sherman assume to have such control over the roller as to affect the engine—affect the movements of the engine?" Defendant objected as irrelevant, immaterial and incompetent, and called for the conclusion of the witness. The objection was overruled, and the witness answered: "I think not." The witness, continuing, said: "Nothing was said in the lease of the engine to the city about discharging the engineer. I secured the engine under the authority of the board of public works. We had to have a roller, and this was the most available one. . . . . We said nothing about anybody to run it, or about pay. The understanding was that the machine, with the fuel and engineer, should be supplied at so much per day. Q. As a matter of fact, this roller, while operating upon that street, was entirely under the direction of yourself or foreman, was it not? A. Yes, sir. We controlled to the extent of notifying what portion of the street we wanted rolled. I exercised the judgment as to when the road was rolled enough and when it was not. I did not stipulate as to any particular engineer." Witness Conger, one of defendants, testified that he had been working for the city works for five days previous to March 4th; that the company gave him no directions about the manner in which the streets should be rolled, "or as to the control of the engine. The roller was left on the street at night, and was not taken back to the company's house. Mr. Sherman, the foreman of Mr. Miller, gave me directions regarding the manner in which the

streets were to be rolled, and I obeyed them. The superintendent of streets directed me to change from one side of the street to the other, and that I should stop rolling on the north side, and continue work on my south side. It was on this south side that I got into the hole in which the roller was stuck. Mr. Sherman was present all the time I was working. He had four or five men there, to my recollection, employed in spreading the rock on the street. I was appointed to my position by Mr. Gunn, superintendent of the California Improvement Company, and was paid by check of the California Improvement Company at the expiration of each month." This is all the evidence introduced upon this point. The learned trial judge seems, by the findings, to have based his conclusion that the relation of master and servant existed between the engineer, Conger, and the company, upon the facts found that the company selected the engineer, paid for his services, and had the right to remove him. There is no direct evidence that the company reserved the right to remove the engineer, but the fact may be assumed to be as found. It would probably follow from the fact that the company was to furnish the engineer. It is well settled, and respondent concedes the rule, that the question of liability does not depend upon the fact that the servant is in the general employ of a third person: Cotter v. Lindgren, 106 Cal. 602, 46 Am. St. Rep. 255, 39 Pac. 950, cited by both parties; Whart. Neg., sec. 173. Something more than the right of selection and removal on the part of the principal is essential to the relation. The right must be accompanied with the power of subsequent control in the execution of the work to be done: Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345. Nor do we think it would follow from the fact that the company selected the engineer, and might remove him, and was to pay his wages, that the company had control over him for the particular employment in which he was engaged. "The understanding was that the machine, with the fuel and engineer, should be supplied at so much per day." When these were supplied, the outfit passed under the control of the city to do its work, and was so engaged under the directions of the proper officer of the city when the accident occurred. "As a matter of fact, this roller, while operating upon the street, was entirely under the direction of the superintendent," as he testified. The evidence was that the engineer was directed to

cross to the south side of the street, and roll the broken stone that had been placed there. An unknown soft place in the street disclosed itself, and the roller began to sink into a hole, from which it became necessary to extricate it, and to do so the engineer was compelled to increase the steam pressure in order to supply the engine with sufficient power to lift itself out of this depression. Some little time was consumed in this effort, during which passing teams were halted to await the result, and, among others, plaintiff's horse and cart in which he was riding. Finally, by increasing the steam, the engineer got his machine out of the hole on firm ground, and backed it to the side of the street so that the teams could pass. At this moment, and while the steam was on under high pressure, plaintiff started to pass, and, at the same time, as the court found, the steam escaped from the safety valve, and so frightened plaintiff's horse that he turned suddenly around, and threw plaintiff to the ground, thus injuring him. The court found that it was necessary to generate all the steam which the engine could safely carry, but that the engineer was guilty of negligence in not warning plaintiff that there was danger of the escape of steam through the safety valve. It clearly appears, without conflict, that Conger went where he was directed to go by the superintendent; that the soft place in the street was not discovered until the roller got onto it, and began to sink; that it was necessary to increase the steam at once, or the roller would have continued to sink, and be beyond the power of extricating itself; that all the steam the engine would carry became necessary, and, finally, after much effort, the machine lifted itself out. The accident resulted from the necessity of increasing the steam in the boiler, and this became necessary because the roller had been directed to work where the ground was too soft to hold it up. There is no pretense that the engineer was unskillful in managing the engine in the effort to extricate it. The roller and engineer had been working for the city for five days previously without complaint as to the fitness of the roller or skillfulness of the engineer, and the complaint now made is not as to the facts just mentioned, but that the engineer was at fault in not warning plaintiff that a high pressure was on the boiler, and the safety valve was liable to let the steam escape. It seems manifest to us that the accident resulted while the engineer and the roller were under the direc-

tion and control of the city superintendent, and that for the time being the company had no control whatever in the matter, and for that particular work was not the engineer's master. Respondent suggests that there is no evidence tending to show that the engineer was released from the service of the company. The evidence on this point showed only that the engineer was paid for his services by the company, and this is entirely consistent with the right of the city authorities to direct where and how the work was to be done after it had taken him and the roller into its employ. A city had leased from a railroad company an engine and train of cars to carry gravel to its waterworks, and the company agreed to furnish a conductor, engineer, fireman and brakeman to manage the train, all of whom it paid, and also furnished necessary fuel for the engine. The conductor had general charge of running the train, but received his instructions as to the performance of his work from the city employees. The plaintiff was injured by the negligence of the engineer in running at an unlawful speed. It was held that the city was liable. The court said: "It is well settled that one who is the general servant of another may be lent or hired by his master to another for some special service, so as to become, as to that service, the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired": Coughlan v. City of Cambridge, 166 Mass. 268, 44 N. E. 218. An agreement was made by a railroad company with H. & Co., by which the latter were to construct a branch road, the railroad company "to furnish all motive power and cars, and operate the construction trains." H. & Co. had control over the laying of the track. It was sought to hold the railroad company for the negligent conduct of the engineer in running the train over the unfinished track at a dangerous rate of speed without keeping a lookout ahead. It appeared that H. & Co. had the right to direct where to place the train, to unload, stop or to start it; and it was held that the fact that the crew were retained on the railroad company's payrolls did not tend to show that the railroad company retained any control of the movements of the train. The railroad company was held not liable: Miller v. Railway Co., 76 Iowa,

655, 14 Am. St. Rep. 258, 39 N. W. 188. Much to the same effect are the following cases: Byrne v. Railroad Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; Powell v. Construction Co., 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691. Respondent cites in reply: Coyle v. Pierrpont, 37 Hun (N. Y.), 379; Huff v. Ford, 126 Mass. 24, 30 Am. Rep. 645; Ames v. Jordan, 71 Me. 540, 36 Am. Rep. 352; Gerlach v. Edelmeyer, 88 N. Y. 645, and Du Pratt v. Lick, 38 Cal. 691. In the case reported in Hun a stevedore was employed by the owners of a vessel to unload it at docks owned by defendants. Defendants hired to the stevedore a portable engine, with an engineer to run it, to furnish power to hoist the cargo from the vessel and lower it on the wharf. By the negligence of the engineer an employee of the stevedore was injured. It was held that defendants, as masters, were responsible for the engineer's negligence. It does not appear from the report of the case that the stevedore exercised any control over the engineer. The defendants agreed to furnish power; and we cannot discover that any directions were given by the stevedore to the engineer. We do not think the case necessarily conflicts with the principles upon which the present case must rest, and, if it does, we cannot follow it. Appellant cites, contra, Donovan v. Syndicate, [1893] 1 Q. B. 629, where in a similar case the lessee gave directions as to the working of the crane used in unloading the vessel. The lord chief justice said: "The key to the whole case is that Jones & Co. were loading the ship, and not the defendants. The crane was being used for Jones & Co.'s purposes, and not for those of the defendants, and the former must, for that particular job, be considered as Wang's masters." Huff v. Ford was the case of a horse, wagon and the driver hired to the city, and the injury was to plaintiff's window. The driver struck the horse a violent blow, causing it to kick a loose shoe through the window. The case seemed to turn upon defendant's duty to see that his horse was properly shod. The case would be analogous if the injury in the present case had resulted from defects in the engine, which it is not claimed to have been the case. We do not find that any of the cases cited by plaintiff necessarily conflict with the views we have expressed. We are of the opinion that the court erred in its finding and conclusion as to defendant's liability, and for that reason the judgment

and order should be reversed. It is not necessary to notice the other points in the case.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

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## OWEN v. POMONA LAND AND WATER COMPANY.*

L. A. No. 637; June 15, 1900.

61 Pac. 472.

**Appeal—Matters Reviewable.—Under Code of Civil Procedure,** sections 656, 657, defining a new trial as "a re-examination of an issue of fact in the same court after a trial and decision," the supreme court, on appeal from an order denying a motion for a new trial, may review questions as to the sufficiency of the evidence to support the findings and errors of law excepted to, occurring during the trial, but cannot consider the sufficiency of the complaint, nor whether or not the findings support the judgment.

**Vendor and Vendee—Railroad Lands.**—By act of Congress of July 27, 1866, land was granted to a railroad company, and by act of Congress of March 3, 1871, the same land was granted to a different railroad company. By decisions of the supreme court, the railroad company claiming under the prior grant was held to be the owner of the land. Held, that a grantee of the company claiming under the subsequent grant obtained no title, and a purchaser from it was entitled to rescind a contract of sale, irrespective of acts of Congress attempting to cure title in such company.

**Vendor and Vendee—Tender and Rescission by Latter.—Under Civil Code,** section 1501, providing that all objections to the mode of an offer of performance are waived by the creditor if not stated when the offer is made; and under Code of Civil Procedure, section 2076, providing that a person to whom a tender is made must specify at the time any objection he may have, or be deemed to have waived it, where a grantee in a contract of sale tendered to his grantor possession of land the title to which had failed, but coupled with the tender a condition that the grantor should first pay him the value of improvements thereon, to which condition the grantor did not object

*For subsequent opinion in bank, see 131 Cal. 530, 63 Pac. 850, 64 Pac. 253.

at the time, the defect in the tender was waived, and the rescission was good.

**Vendor and Vendee—Delay in Rescission by Vendee.**—Where a grantor's title was derived from one of two conflicting congressional grants, the other of which had been held to be paramount by decisions of the federal supreme court, the fact that this grantee waited from January 1894, to August, 1896, before he rescinded the contract of sale for failure of title in reliance on the grantor's repeated promises to obtain an act of Congress to cure the defect, and to fix up the title, was not such an unreasonable delay as to amount to laches.

**Vendor and Vendee.—Where, in a Suit to Rescind a Sale** of real estate for failure of title, and of stock in a corporation for misrepresentation, the complaint alleged that plaintiff had no knowledge of such defect, and relied on defendant's representations and guaranties, which allegations were not denied in the answer, the trial court was justified in finding that such allegations were true.

**Vendor and Vendee—Improvements.—Where, in a Suit to Recover the Value** of improvements placed on real estate, the parties stipulated to submit the valuation to appraisers, and such appraisement and stipulation were offered in evidence, on which the court based its finding of value, complaint could not be made on appeal that there was no evidence to support the finding.

**Vendor and Vendee—Improvements.—Civil Code, Section 3306,** providing that, in case of bad faith, the detriment caused by the breach of an agreement to convey real estate shall be the difference between the price agreed and the value of the estate at the time of the breach, did not apply to an action to rescind a contract of sale of land for failure of title, and plaintiff was entitled to recover the value of improvements placed on the real estate, regardless of whether or not they enhanced the value of the real estate in a corresponding amount.

**Vendor and Vendee—Rescission.—Where the Parties to a Suit to Rescind** a contract for the sale of land and corporate stock stipulated that defendant corporation had published a prospectus of its lands, one of which plaintiff received, it was harmless error to admit the stipulation in evidence, over defendant's objection that the prospectus was incompetent, where the prospectus itself was not offered.

**Vendor and Vendee—Rescission.—In a Suit to Rescind a Contract** for the sale of real estate for failure of title and of corporate stock for misrepresentation, the court properly admitted in evidence an application for the purchase, signed by plaintiff and defendant corporation, which contained representations as to the stock, and recited that a portion of the purchase price of the land and stock was paid, and that the balance was to be paid within ten days after

**certificate of title, as the recitals tended to prove an agreement to give a good title, and the application was properly construed with the contract.**

**Vendor and Vendee—Rescission.—Where a Complaint to Rescind a Sale** of real estate for failure of title alleged a tender of the balance due on the purchase money, which the answer did not deny, and the parties had stipulated that such tender was in fact made, it was not error to exclude evidence offered by defendant to show that the tender was but a mere pretense.

APPEAL from Superior Court, San Bernardino County.

Action by John A. Owen against the Pomona Land and Water Company to rescind a sale of land and corporate stock for failure of title and breach of warranty. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John S. Chapman and A. P. Nichols for appellant; Otis & Gregg and John A. Owen for respondent.

COOPER, C.—This action was brought to rescind and cancel a contract for the sale of certain land and stock in a corporation, and to recover the amount paid by plaintiff upon the purchase price, with interest, and the value of certain improvements and amounts paid for taxes, and for a decree that the plaintiff has a lien upon the premises for the amount that may be found to be due. Plaintiff recovered judgment, and defendant made a motion for a new trial, which was denied. This appeal is from the order denying defendant's motion, and comes here on the judgment-roll and a statement of the case.

Upon this appeal we cannot consider the sufficiency of the complaint, nor whether or not the findings support the judgment. We can only consider questions as to the sufficiency of the evidence to support the findings and errors of law occurring during the trial, and excepted to by the defendant: Brison v. Brison, 90 Cal. 327, 27 Pac. 186; Riverside Water Co. v. Gage, 108 Cal. 243, 41 Pac. 299. As the discussion is thus narrowed, we will consider the main propositions in what we deem to be their regular order, regardless of the arrangement in the briefs of counsel.

The defendant had, by an agreement in writing, covenanted to convey to plaintiff, by good and sufficient conveyance, the lands described in the complaint, and certain corporate stock

representing 2.032 inches of water, at the time therein stated, and upon payment of the amount therein named. Under this agreement the plaintiff went into possession of the land described in the contract, erected valuable improvements thereon, and made certain partial payments therefor. The complaint alleges that the title of defendant to the land has failed, that it could not convey a valid title, that plaintiff rescinded the contract, and that he has been damaged in a large amount. One of the most important questions to be determined is as to whether or not the title of defendant failed, or was not a valid and sufficient one. The court found that the defendant "did not have, has not now, and never did have, any valid title to the lands described in said contract, or to any part thereof." Several pages of defendant's brief are devoted to the argument that this finding is not supported by the evidence. The finding is based upon a stipulation agreed to by defendant, and introduced in evidence, which is as follows: "That the lands involved in this action are part of those included in the provisions of the act of Congress of of July 27, 1866, purporting to grant them to the Atlantic and Pacific Railroad Company, and also in the act of Congress of March 3, 1871, purporting to grant them to the Southern Pacific Railroad Company; that, under the supposed authority of said act of March 3, 1871, a patent was issued by the President of the United States, April 14, 1879, purporting to grant said lands to said Southern Pacific Railroad Company, which patent is recorded in the office of the recorder of said San Bernardino county, and which patent was in the usual form; that the said Southern Pacific Railroad Company on the 18th of May, 1882, entered into a contract with one M. L. Wicks to convey to him the lands in question; that afterward said Wicks assigned said contract to defendant, who afterward complied with the terms thereof, and said Southern Pacific Railroad Company, on the 18th of November, 1886, executed a deed which purports to convey said lands to defendant; said deed is recorded in book 51 of Deeds, at page 16, in said recorder's office (Defendant's Exhibit I); that defendant's only right and title to said lands is that derived under the chain of title above set forth, with such remedial legislation, if such legislation is necessary to the establishment of title of defendant, as may be found in any act of Congress applicable to the case."

It will be seen from the stipulation that defendant's only title is derived from the Southern Pacific Railroad Company, and that the lands were included in the prior grant of Congress of July 27, 1866, granting them to the Atlantic and Pacific Railroad Company.

It has been held by the supreme court of the United States that the title to those lands passed to the Atlantic and Pacific Railroad Company by the prior grant, and that the Southern Pacific Railroad Company had no title thereto (United States v. Southern Pac. R. Co., 146 U. S. 570, 36 L. Ed. 1091, 13 Sup. Ct. Rep. 152, 146 U. S. 615, 36 L. Ed. 1104, 13 Sup. Ct. Rep. 163); and it was expressly so held by this court in Southern Pac. R. Co. v. Painter, 113 Cal. 251, 45 Pac. 320. It is not necessary to decide the question as to whether the defendant's title could have been cured and confirmed under the acts of Congress of 1887, or of March 2, 1896. It does not appear that it was so cured or confirmed, and it was not the duty of plaintiff to take any steps to perfect defendant's title. Under the contract the plaintiff was entitled to a valid title. He was entitled to a title unencumbered, and without any palpable defects, free from litigation and grave doubts: Easton v. Montgomery, 90 Cal. 314, 25 Am. St. Rep. 123, 27 Pac. 280; Turner v. McDonald, 76 Cal. 179, 9 Am. St. Rep. 189, 18 Pac. 262.

Defendant devotes a large part of his brief in endeavoring to show that finding numbered 26 is not supported by the evidence. This finding is to the effect that plaintiff, after discovering the defect in defendant's title, rescinded the contract, and tendered to defendant a reconveyance and possession of the property, upon the defendant paying plaintiff the amount due him for improvements and payments made on account of the purchase. The finding is quite lengthy, covering some seven folios of the transcript, and contains all the probative facts which are claimed to show that plaintiff rescinded the contract. It is claimed that the evidence is insufficient to justify the finding. We have examined the evidence, and we think it sufficient. The probative facts claimed to show that the contract was rescinded are fully found and set forth. As to whether or not they did amount in law to a rescission cannot be considered on this appeal. It is found that no objection was at any time made as to the character or form of the rescission. When plaintiff tendered defendant possession

upon conditions, if there were objections to the conditions the defendant waived them by not specifying them: Civ. Code, sec. 1501; Code Civ. Proc., sec. 2076; Kofoed v. Gordon, 122 Cal. 320, 54 Pac. 1115.

It is claimed that the plaintiff did not rescind in time, and was therefore guilty of laches. The court found in the conclusions of law that plaintiff had not been guilty of laches in the rescission of the contract. This conclusion is based upon the other facts found and upon the facts admitted by the pleadings, and we think is fully justified. The complaint alleges that on the day fixed in the contract, to wit, January, 1894, plaintiff offered to, and was ready and willing to, make final payment for the said lands upon the defendant giving him a good title; that immediately thereafter defendant "commenced to assure plaintiff, and from time to time promised him, it could and would acquire title to said lands for plaintiff; that plaintiff need have no concern or do anything about it, that it would be all right"; that plaintiff relied upon such promises and assurances, and believed that defendant would, under the acts of Congress, perfect its title to said lands. These promises are expressly admitted by defendant in its answer. The testimony of plaintiff is that the reason he did not rescind sooner was that he believed and relied upon these promises. We do not think, under the circumstances, that the delay was unreasonable: Freeman v. Kieffer, 101 Cal. 254, 35 Pac. 767; Callender v. Colegrove, 17 Conn. 28.

The fifth finding is to the effect that the plaintiff had no knowledge of the title to said land or the amount of water represented by the stock agreed to be conveyed to plaintiff, except as he was informed of the same by the defendant. It is said that there is no evidence in the record to support this finding. Plaintiff testified that he had no knowledge of the defect in the title until some time in 1893. The complaint alleges that plaintiff had no knowledge of the title except as informed by defendant, and that he relied upon the representations and guaranties of defendant. The answer does not deny that plaintiff had no knowledge of the amount of water represented by the stock, nor does it deny that plaintiff relied upon the representations as to title made to him by defendant. The finding that the value of the improvements made by the plaintiff upon the land was $6,250 is challenged as being unsupported by the evidence. The parties entered into a

written stipulation that appraisers named should appraise and fix the value of the improvements. The appraisers did fix the value at $6,250, and the stipulation and appraisement were admitted in the evidence. The evidence supports the finding.

In the seventh finding it is found that by reason of the improvements the premises were worth $6,250 more than they would have been without the improvements. It is earnestly urged that this finding is not supported by the evidence. Under the view we take of the case, the finding is wholly immaterial. If the plaintiff in good faith, relying on his contract, and without fault on his part, placed improvements upon the land of the value of $6,250, and the defendant failed to carry out its contract under such circumstances as to justify the plaintiff in rescinding, then plaintiff was entitled to recover the value of his improvements, regardless of the question as to whether or not they made the place worth $6,250 more than it would have been without them: Maupin, Real Est., p. 668; 2 Suth. Dam., 2d ed., secs. 587, 589, and notes; Gates v. McLean, 70 Cal. 50, 11 Pac. 489; Worley v. Nethercott, 91 Cal. 517, 25 Am. St. Rep. 209, 27 Pac. 767.

This is not an action merely to recover damages for the breach of an agreement to convey, and therefore section 3306 of the Civil Code does not lay down the rule as to the amount to which plaintiff is entitled to recover in this action.

To discuss the many objections to the thirty-seven separate findings in this record would serve no useful purpose. We have discussed the principal and most vital findings, and as to the others they are supported by the evidence in all cases where they are material. We would not be justified in reversing a case because of insufficiency of evidence to sustain a finding which is not material.

During the trial the parties stipulated "that the pamphlet filed herewith, marked 'Plaintiff's Exhibit B,' entitled, 'Southern California: Pomona, Illustrated and Described,' was published by the defendant in 1888, and circulated by it from that time for several years among those visiting Pomona and contemplating the purchase of lands near that place, and that plaintiff received from the defendant one or more copies thereof before January 14, 1891." Plaintiff offered in evidence the stipulation, and defendant objected upon the ground that the pamphlet was irrelevant and immaterial, and the objection was overruled. It does not appear that the

pamphlet was ever offered or read in evidence. The objection was to the stipulation, and without the pamphlet the stipulation certainly was harmless. The record does not even show that the stipulation was read in evidence. A similar stipulation was made with regard to an application to purchase the lands, which application was signed by plaintiff and the agents of defendant, marked "Plaintiff's Exhibit C." Plaintiff offered, in connection with the last stipulation, said Exhibit C, and defendant objected to both the stipulation and the exhibit. Conceding that Exhibit C was read in evidence, which does not appear from the record, we do not think the ruling error. It tended to show that defendant represented to plaintiff that the stock would convey or carry with it 2.032 inches of water. It showed when the first $150 was paid upon the contract to purchase. It showed that the first payment was to be made within ten days after certificate of title. This certainly tended to prove the agreement to give a good and sufficient title. The application of plaintiff to purchase was made and dated on the same day as the contract or agreement to sell. It described the same land, and was in fact part of the same transaction. Both the application and the contract should be read together. If they are in any respects inconsistent, they should, if possible, be reconciled. If they are precisely the same, then no injury could possibly have been done by admitting the application in evidence.

When plaintiff was on the stand as a witness the defendant asked him several questions in cross-examination as to where he got the money with which to make the alleged tender in August, 1896, and if in fact he did not have one of the directors of the bank go with him with the money to make a mere show of a tender. The court properly sustained objections to those questions. The tender was alleged in the complaint, and not denied in the answer. And it was stipulated "that the several offers, tenders and propositions purporting to have been then and there made were in fact so made by the respective parties hereto." We have examined the other alleged errors of law, and we find no error to the injury of defendant that would justify a reversal of the case. We advise that the order be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

## DIAMOND COAL COMPANY v. COOK et al.

L. A. No. 645; June 23, 1900.

61 Pac. 578.

**Appeal.—Where Defendant Demurred to the Complaint,** but the record did not show that the demurrer was passed on, or that any ruling thereon was called for, but defendant afterward answered, the demurrer must be deemed to have been waived on appeal.

**Pleading.—In Action Against Two, a Complaint Alleging** that plaintiff and defendant, on a certain date, entered into a written agreement, and setting out the agreement, was sufficient as an averment that a certain one of the defendants entered into such agreement.

**Corporation—Presumption of Authority to Take Land.**—Where plaintiff owned a certificate of purchase of state school lands, and the court found that plaintiff was a corporation, but there was no other proof, such certificate is admissible in evidence, as it will be presumed that the corporation had power to purchase and hold lands.

**Vendor and Vendee.—In an Action to Cancel a Sale of Land** to one, and to enjoin another from removing wood therefrom, on which wood the second defendant claimed a lien by virtue of a promise by plaintiff and the other defendant to pay for cutting it, such second defendant cannot object to the validity of the contract of sale between plaintiff and the first defendant, when offered to prove the issues between them.

**Trial—Motion to Strike Out Evidence.—Where Plaintiff Objected** to testimony, and the court reserved decision, and, on re-examination in chief, the evidence was given without objection, it was within the discretion of the court to allow a motion to strike out the evidence without a restatement of the grounds of objection, it being regarded as a renewal of the first objection.

**Statute of Frauds.—Where Defendant had Cut Wood** on plaintiff's property at the instance of a third person, and claimed a payment from plaintiff by virtue of a promise to pay, made after the cutting, but defendant had stated that he would hold the wood until he received payment, and that he did not care whether plaintiff or the third party paid, such promise was within Civil Code, section 1624, subdivision 2, declaring contracts to answer for the debt of another invalid unless in writing; and such promise is not valid under section 2794, subdivision 3, providing that such promise is good where the party receiving it cancels the antecedent obligation, and accepts the new promise as a substitute.

**Vendor and Vendee.—Where an Action was Brought to Cancel a Contract for the sale of land to one defendant, and to enjoin an-**

other from removing wood from the land, and the defendant to the injunction claimed a lien on the wood for cutting it, and asked for foreclosure thereof, the plaintiff's action being equitable, as were also the predominant features of the defense, it was not error for the court to set aside the jury's answers to interrogatories, and substitute findings of his own, though they were contrary to the findings of the jury.

APPEAL from Superior Court, San Bernardino County.

Bill by the Diamond Coal Company against R. L. Cook and H. D. Welch. From a judgment in plaintiff's favor and from an order denying a new trial defendant H. D. Welch appeals. Affirmed.

George B. Cole for appellant; Bledsoe & Bledsoe for respondent.

CHIPMAN, C.—Action to cancel a contract of sale and purchase of land, and for an injunction to prohibit the removal of wood from said land. Certain special issues were submitted to and answered by a jury, but the court set these aside, and made findings of its own, and gave judgment for plaintiff, as prayed for in the complaint. Defendant Welch appeals from the judgment, and from an order denying his motion for a new trial.

1. The defendants appeared by demurrer, alleging that the complaint does not state facts sufficient to constitute a cause of action. There is also an attempt to demur for ambiguity, but the statements are not such as to raise an issue of law on this ground. Defendant Cook did not answer and does not appeal. Defendant Welch answered, and the trial seems to have proceeded as though both defendants were in court. So far as appears by the record, the demurrer to the complaint was not passed upon, and it is not shown that defendants called for any ruling upon it, or called the attention of the court to it in any way. Appellant now claims that "the complaint does not state facts." We presume he means to have us add, "sufficient to constitute a cause of action." The particular wherein it is now claimed that the complaint was lacking in its facts is that there is no distinct averment that defendant Cook entered into the agreement set out in the complaint. The allegation is: "That on the [giving date] plaintiff and defendant entered into a written agreement,

. . . . which agreement is in the words and figures following, to wit." Then follows the agreement in haec verba. This was sufficient. Appellant does not suggest any other defect in the complaint, or other reason why it is insufficient, and we do not feel called upon to look for others. The demurrer must be deemed to have been waived: Silcox v. Lang, 78 Cal. 118, 20 Pac. 297.

Defendant Welch answered, denying ownership of the land by plaintiff; denying the allegations as to Cook's entering into the agreement pleaded, or that Cook failed to perform; denying that Cook fraudulently procured defendant Welch to cut wood from the premises, and denying his own insolvency; alleging that prior to December 19, 1895, the date of the contract, he cut about seven hundred cords of wood on the premises, and delivered at Hesperia about five hundred and fifty cords, and that he had about one hundred and fifty cords on the premises not yet hauled, all of which was with plaintiff's knowledge and consent; that, after this wood was cut, plaintiff agreed to pay defendant Welch for it, and told him that he might look to plaintiff for his pay, and that plaintiff agreed to pay him certain stated prices per cord; admitting that he has threatened to sell the wood, and would have sold it if he had not been restrained. He prays for a dissolution of the injunction, for judgment for $655, and for general relief. In a cross-complaint defendant Welch sets forth the facts as to cutting the wood, as above stated, at plaintiff's instance and request, and alleges the promise of plaintiff to pay him the prices as previously stated in the answer. The cross-complaint further sets forth that he has been in possession of the one hundred and fifty cords of wood not yet delivered, and still is in possession, and that he has a lien thereon for work done and service performed. He prays judgment of foreclosure of his said lien; that said wood—presumably the one hundred and fifty cords—be sold to pay his claim, and "if there should be an overplus, that it be applied in payment of said two hundred cords of wood delivered," etc.; "and if the court should find that cross-complainant is not entitled to have said lien foreclosed, that then cross-complainant have judgment against plaintiff for the cutting of said wood," and that "he have such other and further relief and judgment as are just and equitable in the premises." Plaintiff demurred to the answer and cross-complaint

for insufficiency of facts, and on the ground of ambiguity. The demurrer was not passed upon by the court, and need not be further noticed. Plaintiff answered the cross-complaint, denying its allegations, and averred that defendant Welch was employed by defendant Cook, and that Cook, and not plaintiff, agreed to pay him. The jury returned answers to certain special issues, which the court followed, except in one particular, in its findings of fact. In a running commentary upon the case, appellant makes numerous points in addition to the one already noticed, which will be examined in the order as they appear in his brief.

2. Plaintiff's certificate of purchase, when offered in evidence, was objected to by defendant for several reasons. The only one now urged is that there was no proof that plaintiff corporation was empowered, by charter or otherwise, to hold or own state school lands, or a certificate of purchase of the same. The court found that plaintiff is a corporation, but there was nothing in the case to show the purpose for which the corporation was organized, nor to show the nature of its business. It must be presumed that it had power to purchase and hold land: Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 Pac. 936.

3. The agreement was objected to, when offered in evidence by plaintiff, on the ground that there was no evidence showing that it was executed by authority or resolution of the directors entered on the records of the corporation. The agreement was entered into between defendant Cook and plaintiff. Defendant Welch was not a party to it. The offer was to prove the issues in the case affecting Cook, and not affecting Welch. The only relief sought against Welch was to restrain him from taking wood from plaintiff's land. The invalidity of the contract was immaterial so far as it concerned Welch. He claimed under a separate and distinct contract. Conceding error, it was harmless.

4. Defendant Welch, as a witness in his own behalf, testified that about March 20, 1896, one Kellam, secretary of the plaintiff corporation, came to witness' house, and told him that Cook had forfeited his contract, and no longer had anything to do with the wood, and that he (witness) could look to plaintiff for his pay for the wood. He testified that he had cut the wood with the knowledge of Kellam, but under orders from Cook, and was to receive one dollar and thirty

cents per cord for wood not delivered, and two dollars and thirty cents per cord for wood delivered at the railroad. After he had testified to the promise made by Kellam, it appeared on cross-examination that it was not in writing, whereupon plaintiff objected to the evidence, and moved to strike it out on the ground, among others, that it was incompetent as the promise to answer the default or miscarriage of Cook. The court reserved its ruling, and the trial proceeded. On re-examination in chief the same facts were brought out without objection, and two other witnesses—Welch's wife and his son—who claimed that they were present when Kellam made the promise, testified to the facts without objection. Kellam was recalled in rebuttal, and denied making the promise, whereupon plaintiff moved to strike from the record all evidence concerning the promise of Kellam to Welch, including the testimony of Mrs. Welch and her son, that had been received without objection. The court granted the motion, and defendant excepted. The motion was doubtless regarded as a renewal of the objection made to the testimony of Welch, and to that of his wife and son to the same effect, and in that view it was not necessary to restate the grounds of the motion. It was within the discretion of the court to grant the motion, although the evidence went in without objection. The cases cited by appellant are instances where the court refused to strike out evidence that had not been objected to, which presents a different question from that now here. There was evidence tending to show that Welch was employed by Cook, and was to be paid by Cook. It was after the wood was cut, and some had been disposed of, and plaintiff found that Cook was not keeping his contract, that Welch claims Kellam came to him, and made the promise testified to by Welch and his wife and son. It was clearly a promise to answer for the debt or default of Cook, and was invalid because there was no note or memorandum thereof in writing, subscribed by the party to be charged or by his agent (subdivision 2, section 1624, Civil Code); and we do not think the evidence brings the case within the exception mentioned in subdivision 3 of section 2794 of the same code, as claimed by appellant. There was no evidence that Welch canceled the antecedent obligation of Cook, and accepted the new promise as a substitute therefor; nor does it appear that there was any consideration beneficial to plaintiff, moving

from either party to the antecedent obligation. Welch was asked what he said in reply to Kellam, and answered: "I told him, all right; if Mr. Cook didn't have anything to do with the wood, if he would pay me for it, all right; that I didn't care; and he said that Mr. Cook didn't have anything to do with the wood whatever, and that I could look to the Diamond Coal Company for my pay. Q. And did you? A. Yes, sir; and I have ever since. Q. Have you looked to Mr. Cook since that time for pay? A. No, sir. I didn't consider that he owed me anything. This was the first time I ever saw Mr. Kellam out at my place, and that was the only conversation that I had with him that he promised to pay me anything. Before that time I looked to Mr. Cook for my pay." He further testified that he continued to hold possession of the wood, and claimed a lien on it for his pay. Mrs. Welch testified that her husband said the wood should not be removed until he had his money for it. She testified: "Mr. Welch said that he held his lien on that wood, and that it should not be removed till he got his money. He didn't care who paid it—Mr. Cook or Mr. Kellam." We find no evidence that Welch in any way released Cook or canceled Cook's obligation to him, and, so far as the evidence shows, that obligation still exists. Nor can we discover from the evidence that any consideration moved to the promisor, plaintiff, or that Welch suffered any detriment, or forebore or lost any alleged right to or lien upon the wood. He still retained his claim of lien, and is now asserting it. There had been no previous contract relations between Welch and plaintiff to which we can look in aid of the promise now being urged. There may be hardship, and there generally is in this class of cases, in enforcing the rule; but the duty of the court is none the less imperative to administer the law as it finds it.

5. It is urged that the court erred in setting aside the verdict. The jury returned answers to the special issues submitted to it on November 29th, and some days after the trial had closed, to wit, on December 13th following, the court "set aside the verdict of the jury, and decided said cause in favor of the plaintiff, and ordered that plaintiff have judgment as prayed for, and directed plaintiff's attorneys to draw judgment and findings." Defendant contends that this is an action at law, and that defendant was entitled to have the answers of the jury stand. The action was to foreclose

Cook's interest in the contract of purchase. Welch was made a party for the purpose of enjoining him from removing the wood and timber on the land in question. Thus far the action was clearly equitable. Welch admitted his intention to remove the wood unless restrained. He claimed a lien on one hundred and fifty cords of wood, and asked to have the lien foreclosed, and the wood sold to pay his claim for these one hundred and fifty cords, and he also asked to have any surplus of money arising from the sale applied to pay his claim for the two hundred cords of wood delivered at the railroad. The predominant features of Welch's defense are equitable, while the plaintiff's action is purely equitable. Furthermore, defendant made no claim at the trial, as he now does, that his cross-complaint presented grounds for relief at law. The record shows that certain special issues were "settled and allowed as the only special issues to be submitted to the jury." These special issues did not embrace all the issues presented by the pleadings. The verdict was merely advisory to the court, and, unless adopted by the court, could be disregarded, and the court could make findings of fact: Warring v. Freear, 64 Cal. 54, 28 Pac. 115.

6. For like reason it was not error for the court to find an issue of fact contrary to the verdict of the answer given by the jury to that issue; and also for like reason it was not error for the court to refuse to instruct the jury as requested by defendant. The findings support the judgment, and it is advised that the judgment and order be affirmed.

We concur: Gray, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## PATISON v. PRATT.

Sac. No. 666; June 10, 1900.

61 Pac. 783.

**Appeal.—Findings Based on Conflicting Evidence** will not be disturbed.

APPEAL from Superior Court, Stanislaus County.

Action by Henry C. Patison against Samuel Pratt. From a judgment in favor of plaintiff and an order denying a new trial defendant appeals. Affirmed.

Maddox & Stonesifer for appellant; P. J. Hazen for respondent.

SMITH, C.—The action was brought to recover the possession or value of certain livestock and hay taken by defendant from the plaintiff. The defense was a general denial, and, as to the livestock, justification of the taking under the "act relating to estrays," etc., of March 27, 1897 (Stats. 1897, p. 198). The court found the ownership of the property in controversy in the plaintiff, and the taking of the same by the defendant. The only specifications with regard to these findings are the insufficiency of the evidence to justify the finding of ownership "at any time after . . . . June 15, 1897," the date of the sale of the animals by the constable as estrays, or to justify the finding that "defendant took said property without right." This disposes of the question as to the hay in favor of the plaintiff, and leaves us to consider only the plea of justification, under the act, for the taking of the livestock. On this point it appears from the evidence that the animals were taken up on a tract of land described as the north half of section 22 of a specified township and range, and that the date of the taking was May 3, 1897. This land prior to November 21, 1895, belonged to the plaintiff's wife, Nellie Patison, but was subject to a deed of trust executed by her predecessors in title, Henry Patison and wife, to secure their promissory note to the Sacramento Bank for $2,000, of date June 22, 1881, payable June 22, 1885; and on the day named (November 21, 1895) the trustees executed to the as-

signee of the bank (one Powell) a deed purporting to convey to him the land. Afterward and prior to November 14, 1896, Mrs. Patison, who had continued in possession, leased the east half of the tract to one Laughlin, and on that day (Laughlin being in possession under his lease) she executed to one Murphy a lease of the whole tract for the term of three years, the rent reserved being a fourth of the crops, and he covenanting to cultivate the premises. Both the plaintiff and his wife testified that, on account of the failure of the lessees to cultivate the land as covenanted, the possession of both quarter sections, except forty-three or forty-four acres on the Murphy quarter, and a small part of the Laughlin quarter planted to grain, had been surrendered to Mrs. Patison; and that they were in possession at the time of defendant's entry and the taking of the property sued for, and also that the animals were taken up on the part of the land not in grain. The defendant, who had taken an assignment of Murphy's lease, of date April 10, 1897, and also a lease from Powell, claims that he was in possession of the premises prior to the taking, and that the animals, or some of them, were trespassing on the growing grain. His evidence on these points was evasive and otherwise unsatisfactory, but may be regarded, without affecting the result, as contradicting that of the Patisons. The court found that the animals taken up by the defendant "were not straying upon any premises in the possession of or leased by the defendant"; and in view of the evidence, which, to say the least, is conflicting on this point, the finding cannot be disturbed. It follows that the taking of the animals by defendant was a mere trespass.

Other points are made, but, in the view we take of the case, are immaterial. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: Chipman, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

# PALMER et al. v. CONTINENTAL INSURANCE COMPANY.*

Sac. No. 619; July 9, 1900.

61 Pac. 784.

**Insurance—Liability While Premium Note Unpaid.**—Where an insurance policy provided that the insurer should not be liable while any note for premiums remained past due and unpaid, and the notes executed in payment of premiums contained a similar provision, and the property was destroyed while the first premium note was due and unpaid, the provision was valid, and the insured, by tendering the amount of the note, could not hold the insurer liable for the loss.

**Insurance—Acknowledgment of Receipt of Premium.**—Civil Code, section 2598, enacting that an acknowledgment in a policy of the receipt of a premium is conclusive evidence of its payment, so far as to make it binding, notwithstanding a stipulation that it shall not be binding until the premium is actually paid, applies only to a policy containing a stipulation that it shall not be binding until the premium is actually paid.

APPEAL from Superior Court, San Joaquin County.

Action by Mary G. Palmer and another against the Continental Insurance Company. Judgment for plaintiffs and defendant appeals. Reversed.

Frank H. Gould for appellant; Louttit & Middlecoff for respondents.

SMITH, C.—The suit was brought on a policy of insurance to recover for loss by fire of part of the insured property. The judgment was for the plaintiffs. The appeal is from the judgment and from an order denying a new trial.

The policy was issued June 7, 1897, and purports to be "in consideration of twelve dollars paid, and the payment of installments, when due, as follows: Twelve dollars on the first day of June, 1898, 1899, 1900, 1901," etc. The actual consideration consisted of two notes made by plaintiffs to defendant March 27, 1897—one for $48, payable in installments as above stated; the other for $12.65, payable on or before Octo-

*For subsequent opinion in bank, see 132 Cal. 68, 64 Pac. 97.

ber 1, 1897 ("being first payment for policy of insurance based upon application made this day," etc.). In the mortgage occurs the following provision, following the agreement for insurance: "But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any note or obligation, or part thereof, given for the premium, remains past due and unpaid." And similar provisions are contained in each of the notes. The note for the "first payment" was overdue and unpaid at the time of the fire, which occurred October 11, 1897. Payment was tendered October 15th, but declined on the ground that the loss had already occurred.

The agreement in the policy that the company should not be liable for any loss occurring during default in payment of any note "given for the premium" in its terms applies to all notes coming under that description, including the note given for "first payment"; nor is such an agreement objectionable on the score of public policy or otherwise. On the contrary, agreements of this character in policies of insurance are quite common, and have been sustained in many cases: Joyce on Insurance, secs. 1204, 1205, 1209; Continental Ins. Co. v. Dorman, 125 Ind. 189, 25 N. E. 213; Gorton v. Insurance Co., 39 Wis. 121; Joliffe v. Insurance Co., 39 Wis. 111, 20 Am. Rep. 35; Williams v. Insurance Co., 19 Mich. 451, 2 Am. Rep. 95; Robinson v. Insurance Co., 76 Mich. 641, 6 L. R. A. 95, 43 N. W. 647; Wall v. Insurance Co., 36 N. Y. 157; Curtin v. Insurance Co., 78 Cal. 619, 21 Pac. 370. The only case cited to the contrary is that of Illinois Cent. Ins. Co. v. Wolf, 37 Ill. 355, 87 Am. Dec. 251. But the decision in that case is obviously based upon a misapprehension of the principle invoked to sustain it, which, as stated by the court, is that, "in a deed for conveyance of lands the recital of payment of the consideration may be contradicted, provided it is not sought by such evidence to impair the effect of the deed as a conveyance." The meaning of this, as explained in Kimball v. Walker, 30 Ill. 511, 512, cited in the decision, is that the effect of a deed or conveyance operating under the statute of uses cannot be destroyed by proving there was no consideration. But this principle could have no application to the case under consideration, where it was not sought to impair the effect of the policy in question, but to establish its real terms.

It is, however, contended by respondents that a different rule is established by the provision of section 2598 of the Civil Code, which reads as follows: "An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." But the effect of this provision is simply to apply to policies of insurance the rule applying to deeds above referred to, and thus to make the acknowledgment of receipt conclusive so far as to make the policy binding. Before the enactment of the code the point was disputed. In some cases the acknowledgment of receipt was held to be conclusive, as, e. g., in New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. (N. Y.) 468, and in Goit v. National Protection Ins. Co., 25 Barb. 189, cited in the annotated edition of the code and in Field's Code. In others, as, e. g., in Sheldon v. Insurance Co., 26 N. Y. 460, 84 Am. Dec. 213, cited in same, and in this state in the case of Bergson v. Insurance Co., 38 Cal. 541, cited in Farnum v. Insurance Co., 83 Cal. 258, 17 Am. St. Rep. 233, 23 Pac. 869, the contrary was held. Hence in the case last cited, in construing this section, all that is held is "that a tender of the payment of the premium in full, within the term of the credit allowed, is a sufficient compliance with the condition of payment to sustain an action on the policy"; and similarly in Griffith v. Insurance Co., 101 Cal. 636, 40 Am. St. Rep. 96, 36 Pac. 113, the rule is said to be that, where credit is given for the premium, "the company insuring is liable for a loss which may occur during the period of credit." The reason for the rule, and for its limitation as given, is thus expressed in the former case (citing Van Schoick v. Insurance Co., 68 N. Y. 440): "The fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed that it was meant by the insurer or supposed by either party to make that condition a potent part of the contract." To hold otherwise, it is added, "would be [to impute] a fraudulent intent to" the insurer. Hence the section of the code cited must be construed as applying only to the class of policies described

in it (that is to say, to cases where there is "a stipulation [in the policy] that it shall not be binding until the premium is actually paid"), and as providing that in such cases the policy cannot be annulled by showing, in contradiction to its recitals and to the acts of the parties, that the premium was in fact not paid. Hence the section does not provide generally that the "acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment," but merely that it is thus conclusive "so far as to make the policy binding." Beyond this, as in the case of deeds, the receipt is not conclusive; nor are the parties precluded from showing that the consideration was other than as stated. But here the respondent does not question the validity of the policy, but seeks to enforce its provisions. Nor does it seek to vary the written instrument by evidence aliunde, but relies upon the express terms of the policy and of the note, which, upon familiar principles, are to be taken together as parts of one transaction: Civ. Code, sec. 1642. Nor is it even claimed that the premium was not paid, but simply that it was paid by the note for "first payment"; which was accepted as payment to the extent and upon the terms stipulated, and subject to the express agreement that the liability of the company should cease pending default. We therefore advise that the judgment and order denying a new trial be reversed.

We concur: Cooper, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

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## BASSETT et al. v. FAIRCHILD et al.*

S. F. No. 1366; July 2, 1900.

61 Pac. 791.

**Appeal.—An Assignment of Error not Discussed** in appellant's brief will not be reviewed.

**Corporation—Compensation of Director.—Where a Director of** a corporation performed services as its manager not pertaining to

*For subsequent opinion in bank, see 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082.

his duties as director, he is entitled to recover what such services were reasonably worth, though no rate of compensation was fixed by the board of directors in advance of the performance of the services.

**Corporation—Compensation of Director.—Where a Director Rendered** services for the corporation as manager, which were outside of his duties as director, for which he received payment without the authority from the board, such payment might be properly ratified thereafter; and the directors cannot be held liable therefor, as for a wrongful expenditure of funds.

**Corporation—Quorum—Interested Director.**—Under Civil Code, section 308, declaring that a majority of the directors of a corporation form a quorum, the passage of a resolution ratifying payment of compensation to one of their members for services outside his duties as a director was not invalidated by the fact that such director was present when the vote was taken, though his presence was necessary to constitute a quorum, where the resolution was passed without his vote.

**Corporation.—Stockholders may Ratify the Action** of the board of directors in ratifying a payment to a director for services outside his duties as a director, and the fact that such director was present at the stockholders' meeting at which action thereon was taken did not invalidate it, a majority of the stockholders, independent of such interested stockholder, having voted in favor of the resolution.

**Corporation.—The Fact That Such Ratification** was a ratification of all the acts of the directors since the preceding stockholders' meeting could not be urged against its validity as a ratification of such payment, where the objection was made to the adoption of the resolution at the meeting on the ground that it would cover such specific payment, since that phase of the question was thereby distinctly presented and voted on by the stockholders.

APPEAL from Superior Court, City and County of San Francisco.

Action by A. C. Bassett and another against J. A. Fairchild and others. From a judgment in favor of plaintiffs and from an order denying their motion for a new trial defendants appeal. Reversed.

Frank Shay, C. H. Wilson and E. W. McKinstry for appellants; Gunnison, Booth & Bartnett for respondents.

McFARLAND, J.—It is averred in the complaint that each of the plaintiffs is the owner of at least five shares of the capital stock of the corporation defendant, the Bitumen Consolidated Mining Company, the capital stock being $300,000, divided into shares of $100 each, and that this action is

brought on behalf of themselves and other stockholders. It is also averred that, during the times when the alleged wrongs were committed, defendants Fairchild, Perine, Walrath and Miles were directors of the corporation defendant, the whole number of directors being six, and the other two being plaintiff Bassett and one Swift. It is further averred that said defendants, being a majority of the board of directors, improperly expended certain moneys of the corporation, and the purpose of the action is to recover from them the amount of money alleged to have been thus expended. The court rendered judgment against Fairchild, Perine and Walrath for $10,729.90, which sum consists of $8,665.80 found to have been improperly expended, and legal interest thereon for several years, and against defendant Miles for $7,129.90 for money, and interest thereon, found to have been improperly expended by the directors by acts in which he participated. From the judgment and from an order denying their motion for a new trial the defendants appeal.

The court found the appellants liable for $1,888.05 paid out by them as expenses incurred in defending a certain action brought in the superior court by the San Luis Bituminous Rock Company against the defendant corporation herein and certain others of the individual defendants herein. The ground of this finding is that, owing to the nature of that action, the defendants therein other than the corporation should have borne the expenses of the litigation; and, as this finding is not discussed in appellants' brief, it may be dismissed without further notice.

The chief item of appellants' liability allowed by the court which is contested by appellants is $6,475 paid defendant Fairchild for services as general manager of the corporation defendant before his compensation therefor had been fixed, which sum, with interest thereon, makes up the main amount of the judgment. The record shows that after the case had been submitted to the trial court that court made an order, on August 29, 1896, that judgment be entered for plaintiffs for $1,888.05 alone. In a written opinion attached to one of appellants' briefs, the learned judge of the lower court gives his reasons, which we think are exceedingly cogent, for not allowing judgment for the $6,475 paid to Fairchild. But afterward the court made findings and ordered judgment for the $6,475 and interest, in addition to the said $1,888.05,

and, under an amendment to the complaint, gave judgment, also, for an additional $332.25, which will be referred to hereafter, and ordered that $2,000 be allowed plaintiffs as a counsel fee, to be paid out of the judgment by a receiver who was appointed to collect the same. There is no averment, or proof, or finding of any fraud committed by appellants, but the theory of the complaint seems to be that in authorizing the payment of the said money to Fairchild the appellants acted with gross negligence. The appellants admit the payment of this money, and justify it. The findings seem to follow the theory of the complaint; but so far as they may be construed to find that appellants were guilty of such negligence as would render them liable on the ground of negligence alone, or that they willfully intended to injure the corporation for their own personal gain, they are not supported by evidence. However, the findings on these points need not be closely scrutinized, for the order denying the motion for a new trial contains this language: "There is no evidence in this case that either of the defendants Perine, Walrath or Miles acted for their own private gains. If any finding bears that construction, I regret it, and, if it were necessary to support the judgment, I would grant a new trial. Neither, under my views of the law, is the finding as to negligence material. Perine, Walrath and Miles are held liable upon the ground that they voted money of the corporation to Fairchild without authority of law. If it be assumed that the corporation was indebted to Fairchild for past services, none of the defendants are liable for the money paid to him. . . . . Upon the main question, whether Fairchild had any legal claim for compensation before his salary was fixed by the board, I see no reason to change the views expressed by me in deciding the case." It is apparent, therefore, that the judgment was based on the principle that the payment of the money to Fairchild was unlawful because it was paid before his salary as general manager had been fixed, and that, as will be seen hereafter, it was so entirely illegal and ultra vires that it could not be ratified or made valid by any subsequent act of either the directors or the stockholders. We do not think that the judgment can be affirmed on that principle, under the facts of this case.

The corporation defendant was organized in September, 1891. Its main purpose was to control the mining and mar-

keting of bituminous rock to be taken from several different mines or deposits of bitumen. It appears that these several mines were mainly owned by the persons who formed the corporation defendant, and became its stockholders and directors. The corporation took leases from the owners of these several mines, by the terms of which it was to give them a royalty of one dollar a ton for every ton of bitumen taken from the mines. It seems quite apparent that the main profit which the organizers of the corporation expected to receive was to come through the royalty of one dollar per ton to be paid for the rock taken from the mines which they owned; and, in this connection, we think that the court erred in sustaining an objection to the question asked Fairchild on the witness-stand, whether at the time of the organization of the corporation "it was designed, intended or expected by the directors of the Bitumen Consolidated that, outside of the royalties, there would be large earnings or dividends." Immediately after the organization of the corporation, and in September, 1891, Fairchild was duly elected vice-president and general manager, and remained such during the time mentioned in the complaint. He immediately commenced to perform his duties as general manager, which duties were numerous and onerous, and occupied almost his entire time. The various kinds of work which he did as manager fully appear in the evidence, and need not be here given in detail. It is sufficient to say that his work included direction and supervision of the mining operations in the various leased mines; the supplies required; contracting for hauling rock from mines to cars; purchasing sacks for the rock; attending to shipping receipts and collecting moneys; securing transportation facilities; chartering vessels for shipping rock to points on the northern Pacific coast; seeing that cars which came to San Francisco were properly loaded, and delivered in proper shape to purchasers; looking after office management; and attending to all "business of the corporation which come along from day to day." Before his employment he had visited points as far north as Vancouver, British Columbia, in the interest of the use and sale of bituminous rock, and had become acquainted with public officials and others having control of street paving, and was thus enabled to procure contracts with them for sale of the rock of the corporation. There is no doubt that his services were highly valuable, and the evidence

abundantly shows that they were worth what he received, and there is no doubt that they were of such a character as to preclude any reasonable supposition that they were to be gratuitous. But there was no resolution of the board of directors and no express contract determining what compensation he should have for his services as manager prior to November 9, 1892, and for this reason it is contended by respondents that he cannot legally have any compensation prior to that date. Fairchild expected to receive compensation for his work as manager, the amount to depend somewhat upon the volume of business that would be developed; and the testimony of Walrath, president, and Perine, treasurer, of the corporation, shows that it was not expected by them or the other directors that he was to work gratuitously. Moreover, his work as manager was done with the knowledge of the directors, but there was no formal action taken on the subject until November 9, 1892. Some time before that date the president paid Fairchild, on account of his services, out of the money of the corporation, $3,600; and on November 9, 1892, the board of directors passed a resolution which, after reciting that Fairchild had been in the employ of the corporation since its organization, "as managing agent and manager," and had been paid by the president $3,600 for his services, declared that "the act of said president in advancing and paying said J. A. Fairchild said sum of thirty-six hundred dollars on account of his services be, and the same is hereby, approved, ratified, and confirmed." There were present at this meeting four directors, who constituted a quorum; Fairchild was one of the four, but he did not vote on the resolution, which was passed by the votes of the other three. At this same meeting a resolution was passed reciting that Fairchild had been elected general manager in September, 1891, and had ever since been acting as such, without having his salary fixed, and declaring that his salary "be, and the same is hereby, fixed at the monthly sum of two hundred dollars per month from November 1, 1891, to April 1, 1892, and that thereafter he should receive a salary of seven hundred and fifty dollars per month, which should remain the same until changed by the board of directors." On the tenth day of January, 1893, there was a general meeting of the stockholders. At this meeting there were present stockholders representing two thousand five hundred and ten shares of

the capital stock, of three thousand shares; and by a resolution adopted by a majority of the shares, exclusive of those represented by Fairchild, it was resolved "that all the acts of the board of directors and officers of this company for the past year be approved and ratified."

The by-laws provide that "the compensation and terms of office of all officers of the corporation (other than directors) shall be fixed and determined by the board of directors." This language does not, on its face, mean that the compensation must be expressly and definitely agreed upon and settled before performance of the services; but respondents contend that under the general law, established by judicial decisions, there can be no lawful allowance to an officer of a corporation for services, no matter what their character and value, where the amount of the compensation had been fixed prior to the rendition of the services. Many authorities on this subject have been cited on both sides, and they are, to some extent, conflicting. Most of those cited by respondents merely declare the rule that a "director," as such, without some previous understanding, is not entitled to pay for services which are within the ordinary duties to be expected of him as director, although some of them, no doubt, apply the rule to other officers or agents who are also directors; but as to the last proposition the weight of authority and reason is the other way. As a general rule, when one person performs valuable services for another, whether the other be a corporation or a natural person, the law raises an implied promise to pay a reasonable compensation for the services, unless they are performed under circumstances which show an understanding that they were to be gratuitous. It frequently happens that one natural person performs valuable services for another natural person, for which the former cannot recover because circumstances show that they were rendered without any expectation of compensation. Now, it has been held that directors of corporations cannot, without previous express contract, receive compensation for such ordinary services as are usually rendered by directors without pay; for the common understanding, as declared by judicial decisions, is that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of a corporation, though they be also directors, for which compensation is usually

demanded and allowed, and which could not reasonably be expected to be performed for nothing. The correct rule is stated by the United States supreme court in Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608, 11 Sup. Ct. Rep. 36. In that case Fitzgerald, who was a director of a corporation and its treasurer, acted as superintendent and general manager, and as such did valuable work, "not at all pertaining to his office as director"; and the question was whether he was entitled to compensation for such work done before any compensation was fixed. The opinion of the court states that the trial court "instructed the jury that 'if Fitzgerald, the plaintiff, acted as superintendent, treasurer or general manager of said company, and transacted the usual business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant' (during the time before compensation was fixed), there would be an implied agreement on the part of the defendant to pay what the services are reasonably worth, and afterward repeated this instruction more in detail, confining it to services as manager." The verdict was for Fitzgerald, and the judgment was affirmed. The court said: "The general rule is well stated by Mr. Justice Morton (since chief justice of Massachusetts) in Pew v. Bank, 130 Mass. 391, 395: 'A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of the party does not make him liable upon an implied promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for, or, at least, that the circumstances were such that a reasonable man, in the same situation with the party who receives and is benefited by them, would and ought to understand that compensation was to be paid for them.'

Tested by this rule, we think that the court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. It could not properly have been held, as matter of law, that he was so entitled." And if, under such circumstances, assumpsit would lie for the services, the board of directors would certainly have power to pay the reasonable value of such services. Rogers v. Railway Co., 22 Minn. 25, is a case directly in point. It is stronger in support of the proposition above stated than the case at bar, because the charter of the corporation in that case provided that the board of directors should appoint the officers, "and fix their compensation for the services to be rendered." Rogers was a director and was appointed secretary of the corporation, and also acted as its land commissioner and attorney, and sued for the value of services rendered in such capacities. There had been no compensation fixed, nor any contract made, before the services were rendered; and it was contended there, as here, that no compensation could be recovered for past services. But it was held otherwise. The court said, among other things, as follows: "The evidence showed that the plaintiff, while acting as land commissioner, was a member of the board of directors. If his services as land commissioner had been performed by him simply as a director, it might be that he could not recover for the same, since, in the absence of a special agreement for compensation, he would, according to many authorities, be presumed to have acted gratuitously. But the duties and labors of a land commissioner of a land-grant railroad company do not necessarily nor presumptively pertain to a director, as such. Indeed, it would be unreasonable to suppose that duties so onerous would be undertaken by one acting simply as a director without pay. For such extraordinary services, outside of and beyond his duties as director, a party may certainly recover, notwithstanding his directorship, for the reason that, even if he performs the duties of director gratuitously, these services are not a part of those duties"; citing cases. In Henry v. Railroad Co., 27 Vt. 435, there was a standing resolution of the board that a director should not receive more than two dollars per day for special services; yet a director was allowed to recover for services which were outside his duties as a director in an amount much greater than could have been allowed

under the resolution for services as director. The court said: "There are services which may be rendered for the benefit of a corporation, the performance of which may be delegated by the directors to other persons. For that purpose the directors may employ, as their agents, those who are not members of the corporation, or they may employ one of their own number. A director is not incapacitated to discharge those duties, and receive the same compensation which other agents would be entitled to recover. . . . . In rendering those services the plaintiff was not acting in his official capacity as director, but as the agent of the corporation, and his compensation is no more limited by that vote than it would be if the services had been rendered by others who were not directors." In Sawyer v. Bank, 6 Allen (Mass.), 209, the court, speaking of the circumstances under which the presumption arises that officers of a corporation are to be paid for their services, says: "Such a presumption arises in reference to any species of work, labor or employment which is usually and commonly the subject of hire and reward, and paid for, whether any specific bargain is or is not made concerning it." In Beach on Private Corporations, section 208, the author says: "When the charter of a corporation provides that certain officers may be elected, and their salary fixed, by a board of directors, and a president is thus elected, but without a salary named, the law raises an assumpsit on the part of the corporation to pay a reasonable compensation for his services rendered after election." In Morawetz on Corporations, section 508, the author says: "If a director is properly employed to perform services which do not pertain to his office as director, he is entitled to such compensation as has been agreed upon, or as the services are reasonably worth." There are many other authorities to the same effect as those above cited, but they are too numerous to refer to here: See Ang. & A. Corp., sec. 317; Pew v. Bank, 130 Mass. 391; Chandler v. Bank, 13 N. J. L. 255; Shackelford v. Railroad Co., 37 Miss. 209; Santa Clara Min. Assn. v. Meredith, 49 Md. 389, 33 Am. Rep. 264; Cheeney v. Railway Co., 68 Ill. 575, 18 Am. Rep. 584; First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646; Severson v. Milling Co., 18 Mont. 13, 44 Pac. 79; Felton v. Mining Co., 16 Mont. 81, 40 Pac. 70. There was nothing decided in McCarthy v. Water Co., 111 Cal. 328, 43 Pac. 956, that conflicts with the views hereinbefore stated. There the plaintiff, who

was a director of the corporation defendant, sought to recover of the latter the value of services rendered without any previously fixed salary or compensation; and a judgment in his favor was reversed merely because the trial court had erroneously excluded evidence offered by the defendant which "tended to show the relations of the parties, . . . . and to throw light on the question whether or not it was intended that he should have compensation." The court referred to Barstow v. Railroad Co., 42 Cal. 465, which was also an action brought by a director to recover for services rendered before his compensation had been fixed, and quoted from the opinion in the latter case as follows: "The situation of the parties at the time—the relations, if any, in which they stood, of a business character or otherwise—are important to be known and considered in order to arrive at a correct solution of the ultimate question involved." In neither the McCarthy case nor the Barstow case is there anything in the nature of a decision that there cannot be a recovery by an officer of a corporation who is also a director unless his salary had been previously fixed, but the contrary in both cases is assumed and necessarily decided. In the McCarthy case it is assumed that plaintiff could have recovered on "an implied contract arising out of, and inferable from, the situation and relation of the parties"; and it is further said that "respondent, being a director of appellant, was not entitled to compensation for services rendered the corporation, unless the circumstances were such as to raise an implied assumpsit to pay what they were reasonably worth."

We conclude, therefore, upon the authorities above noticed, as well as upon reasonable and just principles, that Fairchild was not precluded from having a legal claim for the value of his services merely because that value had not been fixed beforehand; that, therefore, the allowance of his claim by the board of directors on November 9th—there being no fraud in the transaction—was not an illegal and invalid act, merely because the compensation had not been previously fixed; and that the amount of such claim cannot upon that ground be recovered by respondents. Directors "are required to exercise reasonable care and sound business judgment, but nothing further than this. . . . . They must exercise the same diligence and care that men of usual prudence and skill

would exercise in the management of a similar business for themselves": Cook, Stock, Stockh. & Corp. Law, sec. 703.

The contention of respondents that the act of the board on November 9th was invalid because the presence of Fairchild was necessary to make a quorum is not maintainable. There is a broad statement of this proposition of respondents in section 3929 of Thompson on Corporations, but the authorities there cited do not sustain the text. The main case cited is Miner v. Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218, but all that was decided in that case was that "it is essential that the majority of the quorum of a board of directors shall be disinterested in respect to the matter voted on"; citing 1 Beach, Corp., sec. 276; Smith v. Association, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677. In the latter case (78 Cal., 20 Pac.), Garey and Crow, who were directors, were interested in the matter voted on, and they, with two others, made the necessary quorum of four at which the resolution in question was passed; and the court said: "It was essential to its adoption that a majority of the quorum should vote for it (Civ. Code, sec. 308); and, clearly, there could not have been such a majority unless the vote of either Garey or Crow was counted in the affirmative." From this language, as well as from what is subsequently said in the opinion, it is clear that, if either Garey or Crow had been disinterested, the court would have upheld the resolution. In 1 Beach on Corporations, section 276, it is said: "Generally a majority constitutes a quorum, and a majority of the quorum may validly act," and "in the case of directors, who occupy a fiduciary relation to the company, it is essential that the majority of the quorum shall be disinterested in respect of the matters voted upon": See, also, Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516, and cases there cited; Foster v. Planing-Mill Co., 92 Mo. 79, 4 S. W. 260. Our Civil Code (section 308) provides, without any qualification, that "a majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act." We think, therefore, that as a quorum was present when the resolutions of November 9th were passed, and as they were passed by a majority of the quorum who were disinterested in the matter voted on, the adoption of the resolutions was a valid cor-

porate act. Moreover, there is no sound objection to the validity of the ratification by the stockholders on January 10, 1893, of the above-mentioned acts of the board of directors. The ratification was done by the holders of a majority of the stock, independent of the stock represented and voted by Fairchild. Under the authorities, there can be no sound contention that the acts of the appellants in question were ultra vires, and therefore void and entirely beyond the reach of ratification. The stockholders could have provided beforehand for the compensation here in controversy, and the majority of stockholders can ratify "acts performed without their authority, if they might have authorized the performance of the acts in question in advance": 2 Mor. Corp., sec. 626. And it is clearly the law that acts intra vires can be ratified by a majority of the stockholders, and that their discretion in the premises cannot be questioned by single stockholders: Cook, Stock, Stockh. & Corp. Law, sec. 684, and cases there cited; Wickersham v. Crittenden, 110 Cal. 332, 42 Pac. 893. "The rule of stockholders' meetings is that the majority governs, and every stockholder contracts that such should be the rule": San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co., 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333. Neither does it matter that the ratifying resolution was a general one, covering all the acts of the directors; for the record shows that express objection was made to its adoption on the ground that it included the compensation paid to Fairchild, and therefore there can be no pretense that the stockholders were ignorant of what they were doing: Underhill v. Improvement Co., 93 Cal. 300, 312, 313, 28 Pac. 1049.

For the foregoing reasons, the judgment and order appealed from must be reversed. Of course, the action of a board of directors in allowing compensation to one of its members should be closely scrutinized, for by such action great injustice is sometimes done; but the asserted principle upon which this case was decided in the court below cannot be maintained, namely, that under no circumstances can an officer of a corporation who is a director be allowed compensation for services unless the compensation had been fixed beforehand, and that in such case there is neither power in the board of directors to make the allowance, nor in the stockholders to ratify. In the case at bar it is quite apparent that the services of Fairchild were not merely formal and preten-

tious. They included the different kinds of work ordinarily expected of the manager of a large business, and it is almost common knowledge that such services are not rendered gratuitously, and that they generally command large compensation.

It is contended by appellants that after the case had been submitted the court made an order allowing an amendment to the complaint, in which there was set up, for the first time, a claim of about $300 for money paid out for an entertainment given to the board of supervisors of San Francisco at one of the mines (which appellants contend was legitimately expended in furtherance of the sale of bituminous rock, and resulted in benefit to the corporation); that in the amendment there was also first set up a claim for $2,000, which was alleged to be reasonable, for counsel fees; that the court also made an order that these new averments "are deemed to have been by defendants denied"; and that these orders were erroneously made. The record, however, does not clearly show that these things occurred as claimed by appellants. Of course, appellants were entitled to contest these new items of the entertainment and the counsel fees, but it does not clearly appear that they were not allowed to do so; and, as a new trial is to be ordered, it is not necessary now to consider these matters. In case judgment, after another trial, shall be rendered merely for the $1,888.05 paid out in the litigation hereinbefore referred to, or for that and also the small amount paid for the entertainment, the court would hardly allow $2,000 for counsel fees; for the latter sum would absorb nearly the entire judgment, leaving nothing for the plaintiffs or for the receiver—a person who, in this class of cases, is generally provided for with inconsiderate liberality. The judgment and order denying a new trial are reversed.

We concur: Henshaw, J.; Temple, J.

## PEOPLE v. WALKER.*

Cr. No. 583; July 9, 1900.

61 Pac. 800.

**Appeal.—Under Penal Code, Section 1237, Permitting** an appeal from a final judgment of conviction or from an order denying a new trial, and from an order made after judgment affecting the substantial rights of the party, and section 1259, providing that, on appeal by a defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment, an appeal will not lie from an order denying a motion in arrest of judgment, since it may be reviewed on appeal from final judgment.

**Criminal Law—Time for Appeal.—Under Penal Code,** section 1239, requiring an appeal from a judgment to be taken within a year, an appeal from a conviction in a criminal case, taken more than one year after rendition of judgment, cannot be considered.

**Criminal Law.—An Appeal will not Lie from an Order Overruling** a motion to discharge from imprisonment, nor from an order denying a motion to vacate the judgment of conviction, since the judgment of conviction was appealable, and all objections could have been reviewed on appeal from it.

**Criminal Law.—An Appeal will not Lie from an Order Overruling** a motion to correct the minutes of the court as to arraignment of defendant, under Code of Civil Procedure, section 963, allowing an appeal from a special order made after final judgment.

**Criminal Law—Vacation of Order Staying Execution.**—Where the court, at defendant's request, stayed execution of judgment of conviction until the judgment had become final by the expiration of more than a year after its entry without appeal, and without a motion for a new trial, defendant cannot object to an order vacating an order directing a commitment to issue; otherwise, the court would be powerless to carry the judgment into effect.[1]

APPEAL from Superior Court, City and County of San Francisco.

George Walker was convicted of embezzlement and he appeals. Appeal dismissed.

Geo. D. Collins for appellant; Attorney General Ford for respondents.

*For subsequent opinion in bank, see 132 Cal. 137, 64 Pac. 133.

[1] Cited in the note in 33 L. R. A., N. S., 121, on power of court to suspend or stay execution of sentence.

COOPER, C.—The defendant was convicted of the crime of embezzlement, and has appealed, or attempted to appeal, (1) from an order denying his motion in arrest of judgment; (2) from the final judgment; (3) from an order denying a motion to be discharged from imprisonment; (4) from an order denying a motion to vacate judgment; (5) from an order denying a motion to correct the minutes of the court as to arraignment of defendant; (6) from an order setting aside an order staying proceedings.

The order denying the motion in arrest of judgment could have been reviewed upon appeal from the judgment. It was not an order made after judgment, and is therefore not an order from which an appeal will lie: Pen. Code, secs. 1237, 1259; People v. Clarke, 42 Cal. 625. The judgment was rendered February 6, 1898, and the appeal therefrom taken June 9, 1899. This was more than one year after the rendition thereof, and the appeal cannot be considered: Pen. Code, sec. 1239; Langan v. Langan, 89 Cal. 195, 26 Pac. 764. The motion to be discharged from imprisonment and the motion to vacate the judgment were, in fact, attempts to attack the validity and sufficiency of the judgment after the time for appealing therefrom had expired. Any grievances the defendant may have suffered by the irregularity or invalidity of the judgment could have been redressed upon an appeal therefrom if taken in proper time. The judgment being appealable, the attack upon it should have been by direct appeal, and not from subsequent orders refusing to annul or vacate it: Goyhinech v. Goyhinech, 80 Cal. 409, 410, 22 Pac. 175; Reay v. Butler, 69 Cal. 585, 11 Pac. 463. The motion to correct the minutes of the court was made after the judgment had become final. There was no appeal pending from the judgment or from any order denying a new trial. It is not apparent to us how the correction of the minutes of the court, after the judgment had been rendered more than one year, could have benefited the defendant. The order, therefore, did not affect any of his substantial rights. Furthermore, it was not an order from which an appeal could be taken: Griess v. Insurance Co., 93 Cal. 413, 28 Pac. 1041. If the order staying proceedings affected any substantial rights of defendant, he should have appealed from that order. It appears that the order was made at defendant's request. The bill of exceptions states: "That the court, by its order, at the request of de-

fendant, stayed the execution of the judgment, and on September 30, 1898, ordered all proceedings stayed in said action until the further orders of the court; that no further order was made by the court until the ninth day of June, 1899, when, on motion of the district attorney, the court ordered that said order of September 30, 1898, be vacated and set aside, and a commitment to said state prison forthwith issue." The appeal is from the order vacating the order directing a commitment to issue. It is not made to appear how the order vacating the order of September 30, 1898, could, of itself, affect any right of defendant. The order directing a commitment to issue was correct. The judgment had become final by the expiration of more than one year after its entry. No motion for a new trial had been made, nor was any such motion pending. The court had denied the other motions made by defendant. It would be strange if, under such circumstances, the court had no power to enforce the sentence. If the contention of defendant is correct, the court, after having, at defendant's request, stayed proceedings until the full expiration of his time to appeal or make a motion for a new trial, would be powerless to carry the judgment into effect. The law does not contemplate any such absurdity. The order vacating the order of September 30, 1898, should be affirmed. The appeal from the judgment and from all other orders should be dismissed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order vacating the order of September 30, 1898, is affirmed. The appeal from the judgment and from all other orders is dismissed.

# CORTELYOU et al. v. JONES et al.

L. A. No. 677; July 18, 1900.

61 Pac. 918.

**Mortgage—Assignment.—Though an Assignment of Notes** secured by a mortgage declares certain express trusts, the assignees may sue to foreclose the mortgage without joining the beneficiaries.

**Mortgage—Foreclosure—Attorney's Fees.**—Where a mortgage provides that the mortgagee may include in its foreclosure a reasonable attorney's fee, and a copy of the mortgage is attached to and made a part of the complaint in foreclosure which alleges that plaintiffs have employed an attorney and become liable to him for a reasonable fee, "which fee is secured by said mortgage," there is a sufficient allegation as to attorney's fees to support a judgment therefor in plaintiffs' favor.

**Mortgage.—An Assignment of "Those Certain Mortgages and Credits** more particularly described as follows," followed by a description of the mortgage in suit, which sets forth the notes sued on, and declares that it is made to secure them, after which the assignment includes "all other moneys now due to me from any source whatever," is a sufficient assignment of the debts secured to support an action by the assignees, though the assignment is not of the notes themselves.

**Mortgage.—Where to a Bill to Foreclose a Mortgage is Attached** a copy of the mortgage, which contains a recital that it "draws eight per cent net, as security for the payment of a promissory note, of which the following is a true copy," whereupon follow copies of the notes set out in the complaint, and this is not denied by the answer, the title of plaintiffs, who are assignees of the mortgage only, to the notes, is so far admitted as to sustain a judgment in their favor thereon.

**Mortgage—Taxes.—The Provision in the Mortgage** that the mortgagor shall pay taxes "on said premises, other than taxes on this mortgage or the money hereby secured," does not oblige the mortgagor to pay taxes on the mortgage itself.

APPEAL from Superior Court, Los Angeles County.

Action by C. A. Cortelyou and E. E. Johnson against O. H. Jones and Mary C. Jones. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

J. H. Knunagin and O. H. Jones for appellants; E. E. Johnson and C. D. Welbur for respondents.

McFARLAND, J.—Action on two notes—one for $720 and the other for $630—and a mortgage to secure the same, all made and executed October 24, 1892, by defendants to Mercy Stoddard, and averred to have been assigned by the latter to plaintiffs. It is averred in the complaint that the first note has been paid, but that the whole of the principal and some of the interest on the second note are due and unpaid. Judgment was rendered for plaintiffs for a certain amount, and $75 attorneys' fees, and a decree of foreclosure to satisfy the same. Defendants appeal from the judgment and order denying a new trial. We will notice such points made for a reversal as call for any consideration.

Appellants contend that respondents cannot maintain the action in their individual capacity, because the written assignment under which they claim declares certain trusts. This contention cannot be maintained. A trustee of an express trust may sue without joining with him the beneficiaries: Code Civ. Proc., sec. 369.

The amount found due by the court is justified by the evidence.

The mortgage provides that upon default of payment the mortgagee, or his assigns, "may foreclose this mortgage, and may include in such foreclosure a reasonable counsel fee"; and this is an express provision that the mortgage is to be security for the counsel fees. Appellants contend that there is no averment about counsel fees in the complaint. A copy of the mortgage is attached to and made a part of the complaint, and, whether or not that could be considered in the light of an averment, there is an allegation in the amendment to the complaint that respondents had employed an attorney and become liable to him for a reasonable fee, "which said fee is secured by said mortgage"; and this is sufficient on the subject, within any rule of pleading not unreasonably strict.

It is contended that the judgment cannot stand because the assignment introduced in evidence is not of the notes, but merely of their incident—the mortgage. The assignment is not expressly of the notes, and is not, therefore, in the best legal form; but by the instrument the assignor assigns, etc., "those certain mortgages and credits more particularly described as follows, to wit." Following this there is a reference to a certain mortgage made by one Wetenhall, and then

to the mortgage sued on in this action, which mortgage sets forth the notes described in the complaint, and declares that it is made to secure the same. After that is the following: "Also, all other moneys now due to me from any source whatever. Said mortgages and debts and credits to be collected, and the proceeds to be held in trust," etc. This was clearly an assignment of the debts secured by the mortgage, and the fact that the debts were evidenced by the note set forth in the complaint and in the mortgage does not render the assignment ineffectual—at least, as between the parties to this action. The notes were produced at the trial to be delivered up and canceled, and neither the rights of third parties, nor the rights of appellants in relation to third parties, are involved. Under these circumstances, it would be trifling with justice to reverse the judgment on account of the inartificial form of the assignment. Moreover, in the copy of the mortgage which is set out as part of the complaint appears the following: "This mortgage draws eight per cent net, as security for the payment of a promissory note of which the following is a true copy, to wit [copies of the notes set out in the complaint are attached to the mortgage]"; and there is no denial of this in the answer.

There is nothing in the contention that the mortgage obliges the mortgagor to pay taxes on the mortgage. The provision on the subject is as to "taxes on said premises, other than taxes on this mortgage, or the money hereby secured." The judgment and order appealed from are affirmed.

We concur: Temple, J.; Henshaw, J.

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## WILLIAMS v. GROSS.

Sac. No. 621; July 19, 1900.

61 Pac. 934.

**Quieting Title—Adverse Possession—Appeal.**—Where, in a suit to quiet title, plaintiff and his grantor claimed title by adverse possession, and there was an irreconcilable conflict in the evidence as to whether plaintiff's grantor had furnished the money with which the property was bought, the findings of the lower court on such question will not be disturbed on appeal.

**Adverse Possession—Payment of Taxes.**—Code of Civil Procedure, section 325, provides that in no case shall title by adverse possession be considered established unless the party claiming such title shall have paid all taxes assessed against the land. Plaintiff and his grantor claimed title to a portion of a mining claim by adverse possession, and alleged payment of taxes by them for a period of thirteen years. Plaintiff's grantor testified that he furnished the money to his niece, and she paid the taxes. The niece and other witnesses denied that she received money from plaintiff's grantor, and stated that she paid the taxes with money belonging to her brother. The tax receipts offered in evidence confirmed the latter witnesses. Held, sufficient to sustain a finding that the taxes had not been paid by plaintiff or his grantor during the years claimed, and hence that they had not acquired title by adverse possession.

APPEAL from Superior Court, Tuolumne County.

Suit by Owen T. Williams against J. R. Gross to quiet title. From a judgment in favor of defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

F. W. Street and Crittenden Hampton for appellant; F. P. Otis for respondent.

GRAY, C.—In a suit to quiet title the defendant had judgment, and the plaintiff appeals to this court from said judgment and from an order denying him a new trial.

Two separate causes of action are stated in the complaint. The second cause of action as stated is to quiet plaintiff's title to all that portion of the north extension of the Marryatt quartz mining claim which lies north and east of what was formerly the old county road leading from the present county road at Swerer's store, in Tuttletown, over the hill, to the present county road, at a point near the old Patterson millsite. Said property is situated in Tuolumne county. Plaintiff and his grantor claim title to that portion of the north extension of the Marryatt quartz mining claim above described, by adverse possession of thirteen years immediately preceding the commencement of the action, and allege that they have paid the taxes thereon all during that period. The complaint further alleges in the second count that, for more than eight years prior to the commencement of the action, plaintiff and his grantor have been owners, and that plaintiff now is the owner, of the said premises. It is upon this second cause of action that plaintiff relied particularly at the trial of the case,

and upon which he now relies upon this appeal, and to which all his points and assignments of error in the appeal from the decision of the lower court are directed. Therefore it will not be necessary to further notice plaintiff's first cause of action. The defendant, in his answer, after denying the allegations of the second count of the complaint as to adverse possession, payment of taxes and ownership by plaintiff, claims ownership to the property in controversy in himself by virtue of having located and filed a mining claim in 1884, and having since that time possessed and worked said claim according to law, which said mining claim embraces within its limits the property here in controversy. Defendant also pleaded a judgment in a former action as a bar to plaintiff's right to recover in this action.

The findings negative the more material allegations of the complaint, and coincide with the principal allegations of the answer. These findings are attacked by appellant, and upon such attack, alone, hangs the decision herein. It is said, first, that the evidence is insufficient to justify that portion of finding 14, wherein it is found that one F. E. Gross on the twenty-ninth day of November, 1879, acquired all the right, title and interest (consisting of a mere possessory right) which the estate of Thomas Leach had in the premises in controversy. Appellant introduced evidence at the trial tending to show that his predecessor in title, F. J. Gross, had furnished the money to buy, and had bought, the interest of the Leach estate in the said premises, but had the deed thereof made to F. E. Gross, with the distinct understanding that the title was to be held in trust for the said F. J. Gross. This evidence was flatly contradicted on behalf of respondent both by testimony as to where the purchase money came from, as well as by evidence of numerous declarations and admissions on the part of F. J. Gross, made prior to his conveying the property to plaintiff, to the effect that F. E. Gross bought the property with his own money, and that it was the property of said F. E. Gross. We cannot say, from the record before us, that the finding does not find support in the evidence. Where there is a substantial conflict in the evidence, this court does not interfere, as to questions of fact, with the decision of the tribunal before which the witnesses have appeared. The finding that neither F. J. Gross nor his grantee, the plaintiff, paid the taxes on said property before the year 1895, is also

attacked as not supported by the evidence. Here, again, the evidence was in irreconcilable conflict. F. J. Gross testified that he furnished the money to his niece, Mary Gross, and with it she paid the taxes. Mary, on the contrary, testified, in addition to other evidence to the same effect, that she received no money from F. J. Gross, but paid the taxes with the money of her brother, F. E. Gross, and produced the tax receipts in confirmation of her statement that the taxes were paid for and on behalf of her said brother. The payment of the taxes by F. E. Gross could not be considered as payment for or on behalf of F. J. Gross, on any theory of a trust relation between them, because, as we have already seen, the findings negative any such trust relation. The finding as to the non-payment of the taxes, therefore, seems to be supported by the evidence. It is needless to consider whether the other findings challenged are supported by the evidence or not, or whether they are as full and complete as they should be, for the reason that the plaintiff, as we understand his brief, relies solely on title by adverse possession, and, not having paid the taxes, he could not recover on his alleged title by prescription or adverse possession, whatever the findings might be as to the other facts upon which he relies, in part, to uphold his said title: Code Civ. Proc., sec. 325. The payment of the taxes assessed against the land by the party claiming such title is an essential element of title by prescription. It is also immaterial whether the defense of res adjudicata interposed by defendant is good or bad. The plaintiff could not recover, were the finding in his favor on said defense. Nor is it material to determine whether the court erred in receiving in evidence the judgment-roll offered in support thereof. The judgment and order should be affirmed.

We concur: Haynes, C.; Smith, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## MILLER & LUX v. BATZ, County Treasurer.*

L. A. No. 800; June 15, 1900.

61 Pac. 935.

**Swamp Lands—Reclamation Funds—Assignment—Sale of Land.** Since Political Code, section 3477, requiring the county treasurer to pay amounts due on reclamation of swamp land to the original purchaser or his assigns, contemplates payment only to the owner or assignee of the indebtedness, mandamus will not lie to compel such a payment to one who is not shown to be the assignee of the claim on the fund of an original purchaser who became entitled thereto, though he claims as a successor in interest of such original purchaser, by virtue of a purchase of the land.

APPEAL from Superior Court, Kern County.

Mandamus by Miller & Lux against J. B. Batz, treasurer of Kern county. From a judgment refusing the writ plaintiff appeals. Affirmed.

J. B. Garber for appellant; J. W. Athern for respondent.

CHIPMAN, C.—Mandamus. Plaintiff seeks to obtain a peremptory writ compelling defendant to pay to plaintiff, out of the swamp land fund of Kern county, the sum of $2,341.71, or as much thereof as that fund contained. The writ was refused, and plaintiff appeals from the judgment. The cause was submitted on an agreed statement of facts. The court made findings of fact, but both parties agree, and it is the law, that the findings should not be considered, and that this court should consider the agreed statement: Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; McMenomy v. White, 115 Cal. 339, 47 Pac. 109. It is not necessary to state the facts in detail, as there is no dispute about them. Plaintiff claims as the successor in interest of certain persons who purchased certain swamp land from the state. Reclamation was made according to law, and the then owners of the land, or their assigns, became entitled, on demand, to be paid out of the

*For subsequent opinion in bank, see 131 Cal. 402, 62 Pac. 680.

swamp land fund of the county the sums claimed in this petition. This right accrued as to $1,931.38 on March 11, 1891, and as to $414.37 on April 14, 1893. In its petition, plaintiff sets forth "that the said land was purchased from the state of California by predecessors in interest of said corporation, . . . . and that there has been paid into the treasury of Kern county by said purchasers, as part of the purchase price of said land, together with interest hereon, the sum of $1,931.38; that thereafter a patent for all the swamp and overflowed lands hereinabove described was issued by the state of California to Henry Miller, as successor in interest of the said original purchasers of said lands; that Henry Miller was the immediate predecessor in interest of said corporation, Miller & Lux, and was a successor in interest of said original purchasers." The facts as agreed upon are the same as alleged in the petition. There is no allegation in the complaint, and no fact stated in the agreed statement, that plaintiff is the assignee of the claim upon the fund, or that Henry Miller was such assignee. In appellant's brief the claim is made that plaintiff's predecessor became entitled to the money in question at the dates above mentioned, but no claim is made on behalf of plaintiff as assignee, other than as successor in interest of the land. Both parties seem to have assumed that a conveyance of the title to the land, or an assignment of the certificate of purchase entitling the assignee to a patent, carried with it an assignment of the claim for the money held by the county treasurer in the swamp land fund, which had been paid in by the original purchasers. In a recent case this court held that the word "assigns," as used in section 3477 of the Political Code, refers to one to whom the indebtedness is assigned, and does not refer to a purchaser of the land, and that a conveyance of the title to the land does not carry with it or operate as an assignment of the fund to which the original purchaser is entitled: Carpenter v. Union, 128 Cal. 516, 61 Pac. 92. Before the writ can issue, it must appear that the petitioner is entitled to the fund in question, but in the present case the only evidence of plaintiff's right to the fund is as successor in interest of the land. We are unable to distinguish this case from the Carpenter case, supra, on

the authority of which the judgment should be affirmed, and we so advise.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## MULLALY v. TOWNSEND et al.*

L. A. No. 623; July 20, 1900.

61 Pac. 950.

**Attachment—Redelivery Bond—Mortgage of Property.**—K. executed to plaintiff a redelivery bond, signed by defendants, to secure the release of an attachment; and, after the release, K. executed a mortgage on the property. Plaintiff, after obtaining judgment against K., issued an execution; but the sheriff released the levy and returned the execution unsatisfied, because the property was claimed by the mortgagor, whereupon plaintiff sued defendants on the redelivery bond. Held, that the levy of the execution by the sheriff constituted a sufficient demand by plaintiff for the return of the property to support an action against the sureties on the bond.

APPEAL from Superior Court, Los Angeles County.

Action by Joseph Mullaly against F. N. Townsend and others. From a judgment in favor of plaintiff and from an order denying a new trial defendants appeal. Affirmed.

Jones & Willes for appellants; King & Hannon and Henning & Bowen for respondent.

VAN DYKE, J.—The plaintiff commenced this action against the defendants as sureties upon a bond to release an attachment. The action in which the attachment was taken was brought by the plaintiff against one Kelly, and certain personal property, consisting of the furniture in a hotel, was attached. On a former trial the court granted defendants'

*Rehearing denied.

motion for a nonsuit, the defendants admitting that the plaintiff could prove the allegations of his complaint. On appeal by plaintiff from that judgment, this court reversed the same and remanded the cause: 119 Cal. 47, 50 Pac. 1066. In the opinion of the court in that case it is said: "The terms of the bond required Kelly to redeliver the attached property to the sheriff upon demand. As to this demand there seems to be no question. It was not only alleged that, in fraud of the plaintiff's rights, he had mortgaged the property to Hunter, but it is also alleged that an execution upon the judgment was placed in the hands of the sheriff, with instructions to levy upon said property, and that Kelly and Hunter refused to deliver it to the sheriff, otherwise than upon the payment of the $500 to Hunter. This was a refusal to deliver the property. The plaintiff was not bound to accept part of the property, or to accept it all burdened with a lien placed upon it after the execution of the bond, and the release of the attached property thereunder." On the second trial of the case the court found that subsequent to the giving of the said undertaking described in the complaint, dated November 21, 1895, and the release of said attached property, and prior to the levy of execution under said judgment, the said Thomas J. Kelly willfully, and in fraud of the rights of plaintiff to said property and satisfaction of said judgment recovered in said action, gave certain indenture of mortgage upon said property to secure the sum of $500, alleged and claimed by said Kelly to be due from him to one Cal. F. Hunter. The court also found that the plaintiff caused an execution to be taken out on the judgment recovered against Thomas J. Kelly, and placed the same in the hands of the sheriff of Los Angeles county, with instructions to levy upon the furniture and articles attached, which were released upon giving the bond in question; that the sheriff levied said writ upon said property, but that thereafter he was informed that the same was subject to a mortgage to Hunter, as already found; and that on account of such mortgage, and not otherwise, he released the levy, and returned the execution wholly unsatisfied, the said Kelly having no other property out of which to make the amount of the said judgment, or any part thereof. The court also found that before the commencement of this action the plaintiff demanded of the defendants, and each of them, that

they pay the plaintiff the said judgment, and fulfil the obligations as expressed in the undertaking executed by them.

The main and really the only point necessary to be considered, made by the appellants on this appeal, is that there was no demand for the return of the property made by the plaintiff prior to the commencement of the action; the condition of the bond signed by the defendants on the release of the attachment being that the defendant Kelly would, on demand, in the event that plaintiff recovered judgment against him, redeliver the attached property, or in default thereof the defendants would, on demand, pay the value thereof. On the former trial this court held that the allegations of the complaint were sufficient to constitute a demand on the defendant Kelly, and the findings of the court on the last trial, as already set out, are in line with the allegations of the complaint. In speaking of the nature of a return bond given to release an attachment, this court, in Metrovich v. Jovovich, 58 Cal. 341, says: "The condition is that the attached property shall be returned, and the terms of the undertaking are not complied with by an offer or by a return of a portion of the property. It is not pretended in this case that there was any return, or any offer to return, the whole of the property attached. The evidence conclusively shows that the defendant in the attachment proceeding had put it out of his power to make such return. Therefore return is impossible." In this case, as shown and found, after the release of the property the defendant Kelly mortgaged it to one Hunter, and, when the sheriff levied on the property by virtue of the execution issued on said judgment, it was claimed by Hunter. As held by this court on the former trial, "The plaintiff was not bound to take the property burdened with a lien placed upon it after the release of the attachment." There was not only a demand on the defendant for the property, but a refusal on his part to turn it over in the condition in which it was at the time of being released from the attachment. Judgment and order affirmed.

We concur: Harrison, J.; Garoutte, J.

BEATTY, C. J.—I dissent from the order denying a rehearing of this cause, upon a point which is urged by appellant and argued in the briefs, but is not noticed in the opin-

ion of the court. It is alleged in the complaint that the property attached, at the date of the attachment and when it was released, was of the value of $2,000, and was encumbered by liens to the amount of about $800. Defendants, in their answer, deny that the property was of any greater value than $1,000, and allege that it was encumbered by liens to the amount of $1,100. The issue being thus joined as to the value of the property and amount of liens to which it was subject when attached, the court found that the property at the time of the attachment and release was of the value of $1,000, and made no finding as to the amount of the liens, which, according to the allegation of the complaint, was at least $800. Notwithstanding these facts appearing by the judgment-roll, judgment was given against the defendants for $785.50, nearly $600 more than the attachable value of the property. This, to my mind, is palpable error, for which the judgment should have been reversed.

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## ADAMS et al. v. CITY OF MODESTO.*

Sac. No. 659; July 20, 1900.

61 Pac. 957.

**Municipality—Claim for Damages—Demand.**—Under act of March 13, 1883, chapter 49, subchapter 7, section 864, providing that all demands against a city or town shall be presented to and audited by the board of trustees in accordance with such regulations as they may prescribe by ordinance, where plaintiff sued defendant city for damages for maintaining a nuisance, his failure to make a demand on the city prior to the suit was fatal to his cause of action, since the term "demands," as used in the statute, includes claims for damages for torts as well as on contract.

**Municipality—Claim for Damages—Demand.**—Where plaintiff sued defendant city for damages for maintaining a nuisance, without making a demand prior to the suit, and defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, it did not waive its right to raise the objection of plaintiff's failure to make a demand, required by act of March 13, 1883, chapter 49, subchapter 7, section 864, on appeal.

*For subsequent opinion in bank, see 131 Cal. 501, 63 Pac. 1083.

**Municipality—Claim for Damages—Presenting and Auditing.**—Under act of March 13, 1883, chapter 49, subchapter 7, section 864, providing that all demands against a city shall be presented to and audited by the board of trustees in accordance with such regulations as they may by ordinance prescribe, where plaintiff sued defendant city for damages, without making a demand prior to the suit, and the petition contained no averment that the city had not passed any ordinance prescribing in what manner such demands should be presented, plaintiff cannot excuse his noncompliance with the statute on the ground of the city's failure to pass such ordinance.

APPEAL from Superior Court, Stanislaus County.

Action by David Adams and others against the city of Modesto. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Reversed.

P. J. Hazen for appellant; Needham & Dennett for respondents.

CHIPMAN, C.—Action to abate a nuisance and for damages. Plaintiffs had judgment, from which, and from the order denying its motion for a new trial, defendant appeals.

Defendant demurred to the complaint for insufficiency of facts, and in the specifications in support of the motion for new trial it was specified "that there is no evidence that any claim was ever presented to the defendant city for the damage claimed by plaintiffs." The city of Modesto is a municipal corporation of the sixth class, and comes within the provisions of the act of March 13, 1883 (Stats. 1883, p. 93), subchapter 7, at page 266 et seq. Section 864 provides as follows: "All demands against such city or town shall be presented to and audited by the board of trustees, in accordance with such regulations as they may by ordinance prescribe; and upon the allowance of any such demand the president of the board shall draw a warrant," etc. Section 878 provides, among other things, that "the clerk shall also keep a book, marked 'Demands and Warrants,' in which he shall note every demand against the city or town, and file the same. He shall state therein, under the note of the demands, the final disposition made of the same. . . . . This book shall contain an index, in which reference shall be made to each demand. . . . . He and his deputy shall take all necessary affidavits to demands against the city or town, and certify

the same without charge." The act does not provide that no action shall be brought unless the claim is presented as required by section 864, nor is there a limitation as to the right to sue. Section 850 expressly provides that the corporation "may sue and be sued in all courts," etc. Respondent contends: (1) That it does not appear in the pleadings that the claim was not presented. (2) Failure to present a claim must be taken advantage of by demurrer or answer, or it will be regarded as waived; citing 15 Am. & Ency. of Law, p. 1194, note; Sheel v. City of Appleton, 49 Wis. 125, 5 N. W. 27. (3) Statutes requiring the presentation of claims are not usually held to include torts. (4) The act of 1883 requires the presentation of demands in accordance with such regulations as the trustees may by ordinance prescribe, and there is no evidence that the trustees have made any regulations on the subject, or that plaintiffs' claim does not comply with the prescribed form.

Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712, was similar to the present case. The action was for damages caused by grading a street so as to leave plaintiff's lot in a hollow several feet below the street. The claim for damages was not presented to the common council before suit. The city charter did not provide that no action should be brought unless the claim should be first presented. There was no limitation as to the right to sue, and it was claimed that the demand was for damages from a tort. The charter there read: "All claims for damages against the city must be presented to the common council and filed with the clerk within six months after the occurrence from which the damages arose." It was held that a failure to present a claim is fatal to recovery in an action upon it. The term "demands," as used in the act of 1883, is certainly broad enough to include "all claims for damages," which latter are the terms used in the San Diego charter. We are unable to distinguish the present case from the Bancroft case. The term "demands," therefore, includes damages for torts. Has defendant waived its right to raise the question? The point arises on general demurrer: Thompson v. City of Milwaukee, 69 Wis. 492, 34 N. W. 402; Flieth v. City of Wausau, 93 Wis. 446, 67 N. W. 731. Defendant demurred for insufficiency of facts, and the objection was, therefore, not waived. Whether a failure to demur or to raise the question by answer would be deemed a waiver

need not be decided. The act provides that demands must be presented to the trustees "in accordance with such regulations as they may by ordinance prescribe." The act requires the demand to be presented to the trustees to be audited, it is true; but the act authorizes them, also, to allow the demand. As the legislative body of the city they have more extensive powers in matters of demands against the city than ordinarily pertain to the duties of auditing committees of boards of trustees. If, as was held in the Bancroft case, and as we now hold, it was necessary to present the claim to the trustees before suit, and that the fact should appear in the complaint, it would seem to follow that, if plaintiffs wanted to excuse their noncompliance with this requirement, they should have alleged in their complaint that the trustees had made no regulations prescribing in what manner demands should be presented. This view of the point raised by defendant makes it unnecessary to further consider the case. The judgment and order should be reversed.

We concur: Cooper, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

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## SANGUINETTI v. GIANELLI.

Sac. No. 723; July 31, 1900.

61 Pac. 1106.

**Administrator.—Where, in an Action for an Accounting,** brought by a widow against the administrator of the estate of plaintiff's husband, the evidence is conflicting as to whether defendant paid certain claims with his own money, or out of the funds of the estate of plaintiff's husband, a judgment disallowing defendant's claim will not be disturbed.

**Administrator—Dealings With Estate—Presumption as to Regularity.**—Code of Civil Procedure, section 1963, subdivisions 19, 20, providing that the law presumes "that private transactions have been fair and regular," and "that the ordinary course of business has been followed," are not applicable to the dealings of an administrator with an estate and its funds.

APPEAL from Superior Court, San Joaquin County.

Action by Mary Sanguinetti against B. Gianelli for an accounting. From a judgment for plaintiff, defendant appeals. Affirmed.

Louttit & Middlecoff for appellant; Ansel Smith for respondent.

CHIPMAN, C.—Action for an accounting. The court found that within the past two years plaintiff sold and consigned to defendant goods, wares and merchandise, and deposited with and paid to defendant money, at his instance, amounting to $1,206.73, and that during the same period defendant sold and delivered to plaintiff, and she received from him, goods, wares and merchandise from the store of defendant, and also money paid, amounting to $793.34; that on May 27, 1898, there was due plaintiff from defendant, as balance of the account between them, the sum of $413.39, for which amount plaintiff had judgment. Defendant appeals from the order denying his motion for a new trial.

The only question presented by the appeal relates to an item for $700 claimed by defendant, but disallowed by the court. Plaintiff is the widow of G. Sanguinetti, who died in November, 1896. At her request, defendant was appointed administrator of her husband's estate. At his death Sanguinetti was farming a small tract of land (about seventy acres), under a lease from one Weber, which, I infer from the evidence, includes the year ending September, 1897, inasmuch as Weber presented a claim against the estate for the rental, $700, and the claim was allowed. There were numerous items in the mutual accounts as to which the evidence was not brought up. Defendant claimed that plaintiff desired to rent the place from Weber for the year 1897–98, commencing at the close of the rental year for which the $700 claim was allowed, but that Weber refused to rent to her unless the rent for the last year was paid, namely, the year covered by the claim against the estate; that plaintiff came to defendant and stated this fact, and requested him personally to pay Weber, and promised that she would repay defendant; that pursuant to her request he paid Weber, and charged the money to plaintiff's personal account at his store; and

at the hearing he asked its allowance. Defendant testified to facts supporting this view of the transactions. But he was flatly contradicted by plaintiff, and she testified that defendant told her he had paid Weber out of the proceeds of the barley raised on the leased premises for that year, amounting to $868.25. A stepdaughter of plaintiff testified for defendant, and to some extent her testimony supported the testimony of defendant as to the promise to repay him; but on cross-examination she testified that she understood that the Weber claim was to be paid out of the proceeds of the barley belonging to the estate. Defendant received the money for the barley August 18, 1897, and the evidence tends to show that he had funds in his hands as administrator sufficient to pay the Weber claim. On the cross-examination of defendant it appeared that in the bill of items of account presented by him to plaintiff there occurred the following: "Cash paid for assignment of claim of Weber estate to G. Gianelli, and to secure lease for current year—claim and lease held as security—seven hundred dollars." Defendant made no satisfactory explanation of this entry. His books showed the payment on November 3, 1897, while the receipt given by Weber was dated January 12, 1898; and defendant was unable to state when the claim was in fact paid, or to explain what was meant by "Paid for assignment of claim of Weber estate to G. Gianelli." The receipt runs to G. Gianelli, brother and partner of defendant, and defendant's evidence was that he paid the money to his brother, to be by him paid to Weber, and that he knew that whatever was paid was on account of the claim proven in the Sanguinetti estate. An examination of defendant's testimony, direct and on cross-examination, would suggest a strong probability that the trial judge did not give full credence to defendant's statements on the witness-stand. Appellant calls to his aid subdivisions 19 and 20 of section 1963 of the Code of Civil Procedure: "That private transactions have been fair and regular," and "that the ordinary course of business has been followed." These presumptions cannot avail defendant. He was acting in a highly fiduciary character, in his dealings with the estate and its funds. The presumptions referred to do not relate to the dealings of a trustee with trust funds. The evidence is conflicting upon the question as to whether he paid Weber out of the estate funds, or with his own money. The court must

have found that defendant paid the claim as administrator and out of estate money, and we think there is sufficient evidence to warrant the court in so finding. The case is not similar to Lewis v. Burns, 122 Cal. 358, 55 Pac. 132, cited by appellant, where this court held the findings to be unsupported by the evidence. The order should be affirmed.

We concur: Haynes, C.; Smith, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

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## WILLS v. PORTER et al. (PIERPONT et al., Interveners).*

L. A. No. 697; July 31, 1900.

61 Pac. 1109.

**Contract of Corporation—Rescission—Return of Consideration.** Civil Code, section 1691, provides that one party cannot rescind a contract without the consent of the other party unless he restores to the latter everything of value which he has received from him thereunder. A corporation which owed $46,650 to its principal stockholder borrowed money from a bank, and, in consideration of his guaranteeing its note, paid its indebtedness to him before maturity. Held, in an action by other stockholders to compel repayment to the corporation, that the action could not be maintained without releasing the principal stockholder from his guaranty.

**Contract of Corporation—Rescission—Delay.**—Civil Code, section 1691, provides that a party entitled to rescind a contract must do so promptly. A corporation which owed $46,650 to its principal stockholder borrowed money from a bank, and, in consideration of his guaranteeing its note, paid its indebtedness to him before maturity. Held, that an action brought by other stockholders two years thereafter to compel repayment to the corporation could not be maintained, no excuse being shown for the delay.

**Corporation.—Where the Complaint in an Action to Compel Repayment** of money paid by a corporation to its principal stockholder alleged that complainants had no knowledge thereof at the time, but did not allege when they obtained knowledge, it will be presumed on appeal that they obtained knowledge at least by the day following the transaction.

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*For subsequent opinion in bank, see 132 Cal. 516, 64 Pac. 896.

**Corporation.—Where a Corporation Pays a Debt Due Its Principal Stockholder** before maturity, as a consideration for his guaranteeing its note, repayment to the corporation will not be enforced by a court of equity at the suit of other stockholders, without a showing that the corporation or its stockholders were injured in some way.[1]

APPEAL from Superior Court, Los Angeles County.

Action by William L. Wills against George K. Porter and another (Mary Pierpont and others, interveners). From a judgment in favor of plaintiff and interveners and from an order denying a new trial defendants appeal. Reversed.

H. W. O'Melveny and J. H. Shanklin (J. S. Chapman of counsel) for appellants; Winder & Davis for respondent; Smith, McNutt & Hannon for interveners.

PER CURIAM.—This action was brought by plaintiff, as a stockholder of the Porter Land and Water Company, a corporation, for the purpose of annulling a certain resolution passed by the board of directors of said corporation, and of recovering of defendant Porter $46,650, and interest thereon; the said sum having been paid to Porter under the authority of the board of directors, and by virtue of said resolution. A complaint in intervention was filed by certain other stockholders. A demurrer was interposed to the complaint and to the complaint in intervention, and overruled, and answers filed. After trial, findings were filed, and judgment entered thereon in favor of plaintiff and the interveners. A motion for a new trial was made and denied, and this appeal is from the judgment and order denying the motion.

We think the demurrer to the amended complaints should have been sustained. The complaints, as amended, allege, in substance, that on the twenty-third day of April, 1887, the defendant Porter entered into a written contract with one McFarland, by the terms of which the corporation defendant was to be formed, and Porter was to convey to it, for the considerations therein named, 16,000 acres of land of the ranch Ex-Mission San Fernando. Porter then supposed the ranch contained 18,000 acres, and under the contract he was to retain 2,000 acres for his own use, and to

[1] Cited in the note in 97 Am. St. Rep. 40, on actions by stockholders on behalf of corporations.

convey just 16,000 acres to the corporation, and if, upon a survey being made of the ranch, there proved to be less than 18,000 acres, the amount reserved by Porter should be diminished, and the full 16,000 acres conveyed to the corporation. The corporation was formed as provided for in said contract, and a survey made of the ranch, by which it was found that the ranch contained 18,734 acres, or 734 acres more than the number of acres to be conveyed to the corporation after reserving 2,000 acres for Porter. The corporation, after its formation, duly adopted the contract so made by Porter with McFarland, and after the survey of the said ranch it entered into a supplemental contract with Porter in regard to the 734 acres. This supplemental contract recited that the original contract was for the conveyance of 16,000 acres, and that there was 16,734 acres, and that it was impracticable to segregate the 734 acres from the 16,000 acres. It then provided that Porter should convey the 734 acres to the corporation by the same conveyance and with the 16,000 acres. It was further provided, as the consideration for the 734 acres, that the corporation should improve, subdivide and sell it, with the 16,000 acres, and out of the proceeds, after paying expenses and commissions pro rata, to account for and pay to Porter the sum of $40 per acre for each and every acre of the said surplus, and all sums above $40 per acre to be retained by the corporation as compensation for improving and selling it. It was further provided that the payment to Porter for the 734 acres should be made whenever dividends on the capital stock should be declared, and should in all cases be in the proportion of money on hand when the dividends are declared that 734 bears to 16,734, less the proper proportion of costs, expenses and commissions. These payments to Porter were to bear interest from the 16th of August, 1887, at the rate of six per cent per annum; but Porter was to have no interest, except as a stockholder, in whatever interest might be realized upon the profits of the sales of the 734 acres. The said Porter, in pursuance of the contracts, duly executed a deed to the corporation of the 16,734 acres, and certain personal property also included in the agreement. The capital stock of the corporation consisted of 524 shares, of which defendant Porter owns 336, the plaintiff 5, and the remaining shares by the interveners and others named in a list attached to the complaint. The directors of the corpo-

ration were, at all times named in the complaint, Yarnell, Threlkeld, Graves, Forrester, Witmer, Hubbard and Cochran; and, of these directors, it is alleged that Yarnell, Threlkeld, Witmer and Graves hold each one share only, conveyed to them respectively by Porter to qualify them to serve as directors, and that they have at all times acted in the interest of Porter, and as his agents and trustees. On the twenty-ninth day of March, 1895, the corporation was indebted, over and above its indebtedness to Porter, in the sum of about $50,000; and on said date, at a meeting of the directors of the corporation, for the alleged purpose of concentrating all the indebtedness, a resolution was passed to borrow from the Los Angeles Savings Bank the sum of $100,000, and that the corporation execute its note and mortgage for the amount, with interest at the rate of seven per cent per annum net. And the board of directors further adopted the following resolution: "In consideration of the guaranty by Geo. K. Porter of this company's note to the Los Angeles Savings Bank for $100,000, resolved, that this corporation pay to said Geo. K. Porter the amount due him under the contract of date June 29, 1887, at this time, out of money borrowed this day, instead of waiting until the same can be paid out of the proceeds of land sales, the amount now due being $46,650 or thereabouts; the said Geo. K. Porter to rebate interest on the amount paid him, at the rate of one per cent per annum, until said loan of $100,000 is paid off." It is further alleged that in pursuance of the said resolution the said loan was effected, and that the said note and mortgage of $100,000, and some interest thereon, still remain due and unpaid; that the agreement of Porter to guarantee the payment to the Los Angeles Savings Bank was without substantial value; and that Porter received $46,650 of the said money so borrowed by the corporation. It is alleged that in the passage of the said resolution a majority of the directors were acting under the influence of Porter and for his interest, and under his direction and control; that the resolution was procured by the undue influence of Porter, and was the result of a fraudulent contrivance and combination between the said directors and Porter "in order to pay the debt of the said Porter, that was not due, and that would come due only upon the sales of land." It is further alleged that on the nineteenth day of March, 1897, the plain-

tiff demanded in writing of the directors of said corporation "to take steps at once to procure the rescission of said contract, and to compel the said Porter to account to the said corporation for the money received by him as aforesaid, or, upon his refusal, to take the proper legal proceedings to compel him to do so"; that the directors refused to take any such steps or to institute any legal proceedings, and for this reason the plaintiff, as a stockholder, brings this suit, and makes the corporation a defendant. The prayer of the complaint is that the resolution of March 29, 1895, be rescinded and set aside, and also the contract thereby made between the said corporation and the said Porter, and that Porter be required to pay the said sum of $46,650, with interest thereon at the legal rate, to the corporation, or that the same be credited and paid upon the note and mortgage held by the Los Angeles Savings Bank.

The complaint was filed some two years after the resolution complained of and after the note and mortgage had been executed, and guaranteed by Porter. There is no allegation that any interest has been paid upon the note and mortgage, and we must therefore assume that the note, and interest thereon since the twenty-ninth day of March, 1895, still remains due and unpaid, and guaranteed by Porter. The complaint expressly alleges that the guaranty by Porter of the $100,000 note was made in consideration that the corporation pay to Porter the $46,650, and that the money was paid to him. While the corporation still has the loan secured by the guaranty of Porter, it is sought to recover back the consideration for which the guaranty was given and still hold Porter as guarantor. Relief is asked as to that portion of the resolution that is injurious to the corporation, while the benefit that was given by Porter in consideration of the resolution is to be still retained. No offer is made to pay the $100,000 note and interest, and nothing to show any intention to release the defendant Porter therefrom. The plaintiff and the interveners, as stockholders, come into a court of equity, and invoke its aid to protect the corporation from what is claimed to have been an unjust and inequitable transaction. He who seeks equity must do equity. Plaintiff cannot ask the aid of the court to be relieved of the burdens of a contract, and at the same time adopt and retain the benefits. If the circumstances are such that the plaintiff cannot

do equity, he cannot come into a court of equity for relief. His prayer is to have the resolution and contract declared null and void and rescinded, but there is no offer to place the defendant Porter in statu quo. It is provided in section 1691 of the Civil Code, that "rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: (1) He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind; and (2) he must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." In this case the corporation received from Porter the guaranty of its promissory note for $100,000, which guaranty is presumed to be valuable. It has in no way attempted to release him from this guaranty. Before a party has the right to rescind a contract, he must restore the other party to the condition in which he was before the contract was made: Watts v. White, 13 Cal. 321; Buena Vista etc. Vineyard Co. v. Tuohy, 107 Cal. 254, 40 Pac. 386. If it becomes impossible to place the parties in statu quo, there can be no rescission: Bailey v. Fox, 78 Cal. 389, 20 Pac. 868; State v. McCauley, 15 Cal. 430; 21 Am. & Eng. Ency. of Law, tit. "Rescission," p. 89; 2 Pars. Cont., p. 678. The plaintiffs and interveners do not appear to have used due diligence or to have acted promptly in bringing this action: Civ. Code, sec. 1691; 2 Pars. Cont., p. 680; Barfield v. Price, 40 Cal. 542. In the case of Marten v. Wine Co., 99 Cal. 355, 33 Pac. 1107, it was held that a delay of three months in an offer to rescind a purchase of stock, after discovery of the facts constituting fraud in the purchase, was fatal to a rescission. In Bailey v. Fox, 78 Cal. 389, 20 Pac. 868, it was held that a delay of four months after the discovery of fraud in a partnership contract was fatal to the right to rescind. In this case there was a delay of two years, with no excuse for the delay. During all this time the defendant Porter has been held on his guaranty, and is still so held. The property has been in the possession and control of the corporation. Porter has been lulled into letting the matter rest, thinking the land had been fully paid

for. The complaints, as amended, allege that when said resolution was passed and said acts consummated the complainants had no notice thereof, and no knowledge that any such acts had been consummated. They do not say when they obtained knowledge thereof, and we must presume that they had such knowledge at least the day after, to wit, March 30, 1895.

Again, it does not appear that the resolution and acts complained of were beyond the authority of the board of directors, or that they injured the corporation or the stockholders in any way. The land had been deeded to the corporation, and it may have been, and may now be, of great value, as the complaint does not state to the contrary. The interest on the amount to become due Porter ceased after he was paid. It is not claimed that the amount was not the amount of $40 per acre, and interest thereon up to the time of the resolution. The corporation might have been in a condition to pay off the $100,000 mortgage within a short time after its execution. If so, it would be free from the claim of interest by Porter. The acts complained of must appear from the complaint to have been injurious to the plaintiff, before he can invoke the aid of a court of equity: Board v. Younger, 29 Cal. 172; Purdy v. Bullard, 41 Cal. 447; Marriner v. Dennison, 78 Cal. 211, 20 Pac. 386; 21 Am. & Eng. Ency. of Law, 34, note 2, tit. "Rescission." In this case the resolution provided that Porter was to rebate interest on the amount paid him at the rate of one per cent per annum until the $100,000 loan was paid off. This arrangement made the interest to be paid by the corporation upon the purchase price of the 734 acres no greater than six per cent per annum—the amount it had agreed to pay Porter. It does not appear to us how it could injure the corporation merely to change its creditor. A complaint must be measured by its language, and in the face of a demurrer the court cannot presume any facts outside of those alleged in the complaint. The facts stated must be such that, if proven, they would entitle plaintiff to judgment. The judgment and order are reversed.

## WHITE v. WHITE et al.*

S. F. No. 1380; July 31, 1900.

62 Pac. 34.

**Alimony—Enforcement—Sale of Leased Premises—Writ of Assistance.**—In a suit for divorce an interlocutory decree was entered, granting respondent a divorce from her husband, and enjoining the latter from disposing of his property before final decree. Thereafter a receiver was appointed to take charge of all of his property. In the final decree it was provided that the wife, "do have and recover the sum of one hundred thousand dollars," and that the receiver be continued and directed to take all necessary steps to collect the said sum. An order was made directing him to sell certain property, which the husband had leased after the injunction, but before the receiver's appointment, and in accordance therewith the property was sold to respondent. Held, on petition for writ of assistance to gain possession, that, though the judgment was not expressly made a charge on the husband's land, the court had jurisdiction to direct the sale, since the property was under its control by virtue of the receivership.

**Alimony—Enforcement by Sale of Leased Land—Appeal.**—Respondent was granted a divorce from her husband, and awarded $100,000 alimony. Certain land which the husband had leased to his nephew was sold to her in part satisfaction of the said sum. Before the expiration of the lease she petitioned for a writ of assistance to gain possession, but the order granting the writ was not made until after the lease had expired. Held, on the nephew's appeal from the order, that it would not be disturbed by a court of equity, since he had no further right of possession, and therefore could not have suffered injury.

**Alimony—Enforcement by Sale of Leased Land—Writ of Assistance.**—Respondent was granted a divorce from her husband, and awarded $100,000 alimony. Certain land, which the husband had leased to his nephew, was sold to her in part satisfaction of the said sum. She petitioned for a writ of assistance to gain possession, and after expiration of the lease the nephew asked leave to file an amendment to his answer, setting out a declaration of homestead filed by respondent, for the benefit of herself and husband, upon land covered by the lease. He did not allege that he had acquired any interest in the homestead after the expiration of the lease. Held, that leave should be denied, since the nephew's relation to the property would not authorize him to litigate the question of respondent's title.

**Writ of Assistance—Tenant in Possession.**—On Petition for a Writ of assistance to gain possession of land, the tenant in possession cannot question the petitioner's title.

*For subsequent opinion in bank, see 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062.

APPEAL from Superior Court, City and County of San Francisco.

Action for divorce by George E. White against Frankie White. Judgment of divorce for defendant on her cross-complaint and for alimony. From an order granting a writ of assistance to obtain possession of leased premises sold to her in part satisfaction of a decree for alimony, the tenant in possession appeals. Affirmed.

A. A. Sanderson and R. R. Bigelow for appellant; W. H. Linforth, W. T. Baggett and H. E. Highton for plaintiff and respondent.

HAYNES, C.—This appeal is from an order made upon the petition of the respondent, Frankie White, granting her a writ of assistance to obtain possession of certain real estate then in the possession of appellant, Rohrbough, who claims under a lease from the plaintiff, George E. White. The following statement of facts is condensed from said petition: In December, 1885, George E. White commenced a suit against his wife, Frankie White, to obtain a divorce. She answered, and also filed a cross-complaint, with the usual prayer for counsel fees, expenses and permanent support. On May 15, 1889, an interlocutory decree was entered upon said cross-complaint granting her prayer for divorce, and enjoining the plaintiff, George E. White, from in any manner disposing of or affecting the community property or his separate property, except that the plaintiff should "be permitted to pursue and carry on his ordinary business"; this injunction to continue until the further supplemental and final decree should be entered and carried into effect. This interlocutory decree was recorded in May, 1889, in the counties of Mendocino, Trinity and Humboldt, and copies thereof served upon the plaintiff and upon Rohrbough, the applicant herein. On February 9, 1894, a motion was made by Mrs. White for the appointment of a receiver to "take charge, supervision, and possession" of all the property, real and personal, of the plaintiff, of which motion said Rohrbough and White had notice; and on June 18, 1894, such receiver was appointed. On June 9, 1894, the plaintiff, George E. White, executed two certain leases of large quantities of land to said

Rohrbough, the nephew of said White; and it is alleged that the making of these leases was in violation of said injunction, and that both were adjudged guilty of contempt of court, and were punished therefor. It is further alleged that on February 9, 1895, a final decree was entered in White v. White, which adjudged that Frankie White "do have and recover from the said George E. White the sum of one hundred thousand dollars, in lawful money of the United States," and further provided that the receiver be continued and directed to prosecute all suits and actions, "and that he take all legal measures and proceedings to enforce and secure the collection of the unpaid monthly allowance theretofore awarded and then due your petitioner under the interlocutory decree hereinbefore referred to, and also the said sum of one hundred thousand dollars awarded your petitioner by said final decree"; that on April 12, 1895, an order was made directing the receiver to sell the property mentioned in said leases under said judgment; that on July 11, 1895, the receiver sold the same to the petitioner for the sum of $70,000; that on April 18, 1896, a return of said sale was made, and afterward, on due notice, was confirmed, and the receiver conveyed to the petitioner all the right, title and interest of George E. White in and to all the lands described in said leases to Rohrbough. These leases were for the period of eighteen months from April 9, 1895, with the privilege of an additional year. Appended to the petition were copies of the leases, and certain affidavits touching the demand made by the petitioner for possession. Rohrbough demurred to said petition. His demurrer was overruled, and he then answered. Appellant's answer denied that he knew or had any notice of the application for the appointment of a receiver at the time the leases were made, and denied that the making of these leases was not within the usual and ordinary business of George E. White, or was in violation of said injunction. He also alleged that he was the owner of a certain parcel of said land, containing one hundred and twenty acres, particularly described, and also alleged that petitioner had surrendered and conveyed to the Petaluma Savings Bank and to H. T. Fairbanks on March 21, 1896, portions of said lands embraced in her said petition, schedules of which, marked "A" and "B," were attached to his answer, and which he then held under leases from said savings bank and said Fairbanks. Said ap-

plication came on to be heard on October 28, 1897, and was heard upon said petition and answer; and without hearing any evidence from either party, and over the objection of appellant, the court ordered that a writ of assistance issue as prayed for as to all the lands included in appellant's leases, except said parcel of one hundred and twenty acres owned by appellant, and the said lands conveyed by petitioner to the savings bank and to Fairbanks. The record does not show that either party offered any evidence, nor is any point made in the briefs upon this mode of disposing of the case.

It is contended by appellant that this is not a case in which a writ of assistance is authorized; that the judgment to satisfy which the lands in question were sold was an ordinary money judgment, which had not by its terms been made a charge upon the lands of the plaintiff against whom the judgment was rendered, and was therefore enforceable by execution, and was not, under the law and the established procedure, a case in which an order of sale could be issued. Said judgment has never been set aside, modified or reversed. It was entered February 9, 1895, and by it the receiver theretofore appointed was continued. On April 12, 1895, an order was made directing the receiver to sell the property described in appellant's lease, or so much thereof as might be necessary to satisfy said judgment. This was an appealable order, but was not appealed from; nor was the subsequent order of the court confirming the sale questioned by motion, appeal or otherwise, so far as the record discloses. It is not questioned by appellant that the court had jurisdiction of the cause for divorce, and of the adjustment of the property rights of the parties, the future support of the wife, and other incidents to such action; but it is contended, if I correctly understand counsel, that the court had no authority or jurisdiction to make the order directing the receiver to sell, and that the order and the sale were for that reason void. This contention is based upon the theory that, as the decree or judgment did not expressly make the judgment a charge or lien upon said lands, an order of sale could not issue, and that the judgment should have been enforced by execution. Windsor v. McVeigh, 93 U. S. 282, 23 L. Ed. 914, and other cases, are cited in support of said contention. It is quite true that

though a court, as was there said, may possess jurisdiction of a cause and of the subject matter, it is still limited in its mode of procedure, and cannot transcend the power conferred by the law. The case there was in rem for the confiscation of property. A monition had been served, and the owner appeared and answered; but his appearance and answer were on motion stricken out, and the court proceeded to render a judgment of condemnation. It was held that, the service and the appearance and answer of the defendant having been set aside, it was as though no service had ever been made, and the judgment could not be sustained. But this is not such a case. The action of White v. White for divorce was an equitable one. The court could rightfully make provision for the permanent support of the wife out of the separate property of the husband, there being no community property. All this property was in the hands of the court through its receiver, the receivership being continued by the final judgment for the purpose of carrying it into execution; and being thus, technically at least, in the hands of the receiver for such purpose, the court had jurisdiction to make the order directing the receiver "to sell the property mentioned and described in the leases, or so much thereof as might be necessary for the purpose of enforcing the collection of said final judgment." The fact that the property was in the hands of the court, through its receiver, made an order of sale appropriate, or at the least it was not beyond the jurisdiction of the court to enforce its judgment in that manner; and, if within its jurisdiction, it is immaterial, so far as this appeal is concerned, whether or not the court erred in its mode of enforcing the judgment, or whether the leases were made before or after the appointment of the receiver, or whether or not they were executed in violation of the injunction, since, conceding their validity, they expired by their express limitation before the order appealed from was made, and it was not in the power of the lessor to renew or extend them, nor is any right of possession alleged by appellant, except under said leases. He contends, however, that, unless the respondent had the right to have the writ issue at the time her petition was filed, the order could never be granted upon that petition. It is conceded that a plaintiff is not entitled to judgment upon a cause of action which had not accrued at the

time the action was commenced. But this is not an action, but is an incident to a suit in equity, and is itself an equitable proceeding, in which the petitioner seeks to be placed in possession of the fruits of her decree and her purchase thereunder. Appellant pleaded his leases of the lands, which entitled him to retain possession until October 9, 1897, and he alleged no other claim or right. His answer, as legally construed, conceded that the petitioner was the owner of the lands embraced in the order appealed from, and that she would be entitled to the immediate possession of them but for the existence of the leases, under which alone he was in possession, or had any right of possession. But, before the order appealed from was made, appellant's leases expired; and as all the right, title and interest of his lessor, George E. White, in the leased premises had been sold, and become vested in the petitioner, it was not possible for appellant to acquire any right which could operate to extend his right of possession, and, having no right of possession, he can suffer no legal wrong or injury from the making or enforcement of the order. Under such circumstances, a court of equity will not listen to a suggestion from one without right which would postpone the relief to which the petitioner is clearly entitled.

One other question remains. On the day said petition came on for hearing, appellant asked leave to file an amendment to his answer setting out a declaration of homestead filed by Mrs. White in 1884 upon a certain quarter section of land embraced in appellant's lease, said homestead being upon the separate property of the husband, and made for the joint benefit of the spouses. The petitioner waived notice of the motion for leave, but objected that the amendment did not state any defense to her petition, and that it came too late. This motion was made on October 28, 1897, after appellant's lease had expired. It was not alleged in the proposed amendment that appellant had acquired any right to the possession of said homestead after the expiration of the lease, or had any interest in it. The court denied the motion, and appellant excepted. I think the court did not err in denying the motion, not only because appellant had no such relation to the property as would authorize him to litigate the question of the petitioner's title, but because this proceeding is not

intended for nor adapted to such purposes. I advise that the order appealed from be affirmed.

We concur: Gray, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

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## MARKS v. EVANS et al.

S. F. No. 2173; August 2, 1900.

62 Pac. 76.

**Limitation of Actions—Fraud—Corporate Transactions.—Code of Civil Procedure**, section 338, provides that actions for relief on the ground of fraud must be commenced within three years after discovery thereof. A complaint in a suit commenced in 1898 alleged that a corporation's directors conspired to defraud plaintiff, and accordingly sold him considerable capital stock; that in 1888 they levied an assessment on the stock without necessity, and sold his stock in payment thereof; that in 1889 plaintiff commenced an action to set aside the assessment and sale thereunder, which suit was afterward compromised. Held, that the action was barred, since eight years had expired since the fraud was discovered.

**Limitation of Actions—Fraud—Corporate Transactions.—The Fact That a Complainant** in a suit against a corporation's directors for fraudulently selling capital stock alleged that the directors afterward appropriated the corporation's property did not prevent the statute of limitations from running from the time that the sale was discovered, since the sale was the gravamen of the action.

**Limitation of Actions—Fraud—Corporate Transactions.—Where Plaintiff Knew** that a corporation's directors had fraudulently assessed his stock, and sold the same under the assessment, his failure to discover other frauds perpetrated by them, without seeking to inspect the corporation's books, did not delay the running of limitations, since he would be presumed to know all that reasonable diligence would have disclosed to him.[1]

APPEAL from Superior Court, City and County of San Francisco.

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[1] Cited and followed in Smith v. Martin, 135 Cal. 255, 67 Pac. 782, where the plaintiff's grievance was fraudulently inducing him to buy invalid stock, and the complaint showed knowledge of the facts had by him for almost three years before his instituting action.

Suit for accounting by Thomas Marks against Thomas R. Evans and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry E. Highton for appellant; Beverley L. Hodghead for respondents.

GRAY, C.—In this case the court below sustained a demurrer to the complaint, without leave to amend, and dismissed the case. Plaintiff appealed from the judgment of dismissal.

The complaint alleges, in substance, that in or about the month of January, 1883, the plaintiff was, and ever since has been, uneducated, and of a credulous, confiding disposition; that one John Dunn and the defendants Evans and Rodda were acute business men, friends among themselves, and the intimate friends of the plaintiff; that in or about said month last aforesaid the defendants last named and said John Dunn entered into a conspiracy among themselves to cheat and defraud plaintiff, and that in pursuance of said conspiracy they induced him by false and fraudulent representations to subscribe for stock, and put between four and five thousand dollars into a corporation named the San Francisco Fuse Manufacturing Company, which they had formed for the express purpose of receiving the plaintiff's said money, and with the view of subsequently cheating him out of it and acquiring it to their own use; that in 1884, in pursuance of their said conspiracy, the said John Dunn and said defendants Evans and Rodda, being in control of the said corporation, the San Francisco Fuse Manufacturing Company, fraudulently conferred upon themselves salaries ranging from fifty to a hundred dollars per month, and the following year increased the same to from one hundred to one hundred and fifty dollars per month; that the said corporation prospered to such an extent that on the fifth day of September, 1888, it had on hand and under the control of the said John Dunn and said defendants not less than nine or ten thousand dollars in gold coin, together with other property of the value of ten thousand dollars, and was out of debt, except a few hundred dollars; that on the last-mentioned date, in furtherance of the said aforesaid conspiracy, and that they might fraudulently acquire the shares of stock owned by plaintiff in said corporation, the said

defendants Evans and Rodda and said John Dunn, acting as directors of said corporation, without any necessity therefor, in form levied an assessment upon the capital stock of said corporation, and when the said assessment had become delinquent in form, in the manner then prescribed by law, they undertook to, and in form did, sell defendants' said stock, and at said sale said defendants were themselves the purchasers of said stock at a nominal price; that on the tenth day of December, 1888, said defendants, as such directors, undertook to convey, and did in form convey, in the name of said corporation, all the real estate and improvements belonging to said corporation to the defendant Thomas R. Evans, but in truth and fact in a secret trust for the benefit of said defendants Evans and Rodda and said John Dunn; that thereafter in the same month the said parties last named filed a petition for the disincorporation of said corporation; "that on or about the date last aforesaid, knowing as he did of the sale of his stock as hereinabove alleged, and of the conveyance to the defendant Thomas R. Evans, and of the filing of the petition for disincorporation aforesaid, the plaintiff realized and believed that he had not been treated fairly or justly by the said John Dunn and by the defendants Thomas R. Evans and John Rodda, but had a very imperfect and insufficient knowledge of the facts then existing and hereinabove alleged, and which have induced him to commence this suit." The complaint then alleges that in 1889 the plaintiff and one Burnham, another stockholder in said corporation, as plaintiffs, commenced a suit against said corporation, said Rodda, Dunn and Evans, and John Bryant, George Comstock and David F. Macy, as defendants therein. Said suit was commenced for the benefit of said corporation by said named plaintiffs, as stockholders therein, and the object thereof was to set aside the fraudulent assessment aforesaid, and all sales thereunder, and to recover from the defendants therein $3,450, claimed to be the aggregate of the salaries which the defendants had fraudulently conferred upon themselves and appropriated as hereinabove set forth, and to set aside the conveyance to the defendant Evans as above mentioned. The complaint then alleges that said suit was mainly conducted and managed through the coplaintiff therein, said Burnham, and individually the plaintiff herein had scarcely any knowledge thereof, beyond the fact that he was a plaintiff therein,

and that the suit was intended to accomplish the purposes hereinabove expressed; that plaintiff then did not know of what the secret trust referred to in said complaint consisted, and had no knowledge or means of knowledge of the value of the property or amount of money then or since or now belonging to the said corporation and converted to the use of the said Evans, Rodda and Dunn, but such knowledge has been acquired by plaintiff within the last three years prior to the commencement of the present suit. A copy of the complaint in the above-mentioned suit is attached to and made part of the complaint herein, as an exhibit. An indorsement on said complaint shows that it was filed and the action begun February 5, 1889, and it sets forth substantially the same allegations that are contained in the complaint herein and are hereinbefore recited, the only difference being that the date of the conspiracy to defraud plaintiff as alleged in this action was prior to the plaintiff taking stock in the corporation, but in the action commenced in 1889 the said conspiracy is alleged to have been entered into in 1888, about the time of, or just prior to, the time of levying the assessment and selling plaintiff's stock.

There are some other slight differences between the allegations of the complaint in said action begun in 1889 and the allegations of the complaint in the present action hereinbefore set forth, but the general scope and purpose of the said action begun in 1889 are covered by the complaint in the present case. Besides a prayer for general relief, the said complaint filed in 1889 prayed for judgment against said John Dunn, Rodda and Evans for $3,450 and interest, and that the sale of the property of the said corporation made December 10, 1888, be decreed to be void and of no effect. It also appears from the exhibits attached to and made part of the complaint herein that the complaint in the said action of 1889 was duly verified by the oath of the plaintiff Thomas Marks; that an answer to said complaint was filed, and thereafter a stipulation was entered into between the parties to that action to the effect that their differences had been adjusted and settled, and the case might be dismissed and discontinued so far as the plaintiff Marks was concerned. This stipulation was signed by said Marks and his attorneys in that action, and the complaint herein alleges that the suit was dismissed in pursuance of said stipulation, and a similar one

on the part of the coplaintiff Burnham on or about the first day of May, 1894, and that such stipulation was the result of a compromise between plaintiff, on the one hand, and said John Dunn and defendants Evans and Rodda, on the other, in which said plaintiff received $700, and executed some kind of a paper, the nature of which he never understood, but supposes it to have been a release in form; that plaintiff had very little participation in the matter of said compromise, but the same was carried out by the attorneys of the respective parties, and the consent of plaintiff thereto was obtained through his ignorance of essential facts touching the value of the property belonging to the corporation, and his interest therein, and through the influence on him of the said John Dunn and defendants Evans and Rodda, and their representations that the enterprise in which they were engaged had virtually collapsed, and leading plaintiff to believe that the money he had invested was practically lost; that immediately after the dismissal of said suit the said John Dunn and defendants Evans and Rodda divided between themselves, without plaintiff's consent, all the money on hand belonging to said corporation, amounting to nine or ten thousand dollars, or thereabouts, and furthermore held the title and possession of the property of the corporation in common, and in the proportion of one-third to each of them; that the defendant Evans, on or about the twelfth day of December, 1888, deeded to said John Dunn an undivided one-quarter interest in the property of said corporation, and that thereafter, on or about the twenty-fourth day of August, 1895, the said John Dunn died, and the defendant Ann Dunn, his widow, was duly appointed administratrix of his estate, and the interest of the said Dunn, deceased, in the said property was thereafter set apart to said widow, who thence hitherto has possessed and held said interest. The complaint then goes on to state that in the month of June, 1887, the real estate and improvements of said corporation were leased to another corporation, one of the defendants herein, the California Fuse Association, for $300 per month, and that the import of said lease was that for said $300 per month the said San Francisco Fuse Manufacturing Company should refrain from the business of manufacturing fuse, and that said lease was to terminate on six months' notice; that plaintiff understood from the representations of said John Dunn and the defendants Evans and Rodda that

said lease was terminated and brought to an end about one year after its commencement, on or about June, 1888, but plaintiff alleges on his information and belief that ever since June, 1888, and down to the time of the commencement of this action, to avoid competition the said California Fuse Association has regularly paid to said John Dunn in his lifetime, and to said Ann Dunn since his death, and to defendants Evans and Rodda, the said sum of $300 per month, which they have divided among themselves; that plaintiff has only discovered the facts alleged in connection with said leasing "within the past year and a half, or thereabouts, and has discovered the fact hereinabove alleged, that September 5, A. D. 1888, and thereafter down to and including the period of the disincorporation as aforesaid of the San Francisco Fuse Manufacturing Company, its property and assets, including the process aforesaid, were of the value of forty thousand (40,000) dollars, within three years next preceding the filing of this complaint." It is stated in the complaint, with some reiteration, that the various acts of said Dunn and defendants Evans and Rodda complained of were done and performed in pursuance of the aforesaid conspiracy to cheat and defraud plaintiff, and "that by reason of the premises, and through the fraud, combination, conspiracy and confederation in this complaint alleged, the defendants Ann Dunn, Thomas R. Evans and John Rodda have fraudulently and illegally acquired the money and property aforesaid, to the aggregate amount of ninety-six thousand (96,000) dollars, or thereabouts, one-fourth of which, or twenty-four thousand dollars or thereabouts, belonged to the plaintiff, and have converted the same to their own use." The prayer of the complaint is for an accounting, and that plaintiff recover one-fourth of all the money so fraudulently received by defendants and one-fourth of the real property and improvements described in the complaint, and that the California Fuse Association be enjoined from paying to the other defendants, and that they be enjoined from receiving, the said $300 per month.

The foregoing summary, though not containing all of the complaint, is sufficient to illustrate the point upon which the case seems to turn.

The demurrer to the complaint states numerous grounds, and among them we find the following: "That the complaint

does not state facts sufficient to constitute a cause of action." "The said complaint shows that the plaintiff's claim is stale, and that plaintiff has been guilty of laches in the prosecution of the said claim." Several sections of the statute of limitations are pleaded in the demurrer, and among them section 338 of the Code of Civil Procedure, providing that an action for relief on the ground of fraud must be commenced within three years after the discovery of the facts constituting such fraud. We think all three of the grounds of demurrer above stated are well taken, and that the demurrer was therefore properly sustained. This action was commenced July 15, 1898. The complaint verified by plaintiff and filed by him February 5, 1889, and made a part of the complaint herein, shows that plaintiff on the last-mentioned date had full knowledge of the previous sale of his stock in the corporation, and of the fraudulent purpose for which it was so sold. Upon the invalidity of that sale depends the right of plaintiff to recover on account of any of the alleged loss and damage suffered by him subsequent thereto. If that sale was valid, plaintiff, being no longer a stockholder, had no further interest in the corporation, or right to share in its profits or property. Eight years before the commencement of the present action, plaintiff knew of that sale, and the fraudulent purposes connected therewith. He also knew at the same time of the alleged fraudulent sale of the property of the corporation. Inasmuch as a recovery can be had by plaintiff only on the theory that the sale of his stock was fraudulent, and should therefore be set aside or disregarded, he should have brought his action to have that matter adjudicated within the time allowed by law for such an action after the discovery of the act and its fraudulent purpose. The fact that suit was begun in 1889 and compromised and dismissed in May, 1894, more than four years before the commencement of the present action, cannot have the effect to avoid the statute of limitations applicable to the case. Nor can the fact that in the complaint the plaintiff alleges various matters of loss, injury and damage suffered by him from time to time down to the commencement of the present action obviate the bar of the statute. The prime cause of all these losses was the sale of his stock in pursuance of the alleged conspiracy, and his consequent exclusion from the corporation and the profits thereof. This was the gravamen of the action, and the

statute, we repeat, runs from the date of the discovery of the fraudulent purpose of that sale.

As to the alleged frauds and injuries from which plaintiff suffered prior to being sold out of the corporation, some of which are alleged to have been discovered even as late as within a year and a half before the commencement of this action, the knowledge which plaintiff confessed to in 1889 was sufficient to put him upon inquiry as to those alleged frauds and injuries. There is nothing in the complaint to show the exercise of any diligence, either by himself or through the legal advisers which he had in the suit of 1889, to discover to what extent he had been defrauded. It does not appear that defendants tried in any way to conceal the affairs of the corporation. While plaintiff pleads want of information on many subjects, he says little or nothing as to any misrepresentations or concealment on the part of defendants. It does not even appear that access to the books of the corporation was denied to plaintiff, except just previous to the commencement of the present suit; nor does it appear that plaintiff or the attorneys who represented him in the suit of 1889 ever sought to inspect these books, or in any other way ascertain what the corporation was doing. In such a case as this, where he has once discovered enough to put him upon his guard, plaintiff is deemed to have had notice of everything that he might have discovered by the use of reasonable diligence. In Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26—opinion by Van Fleet, J.—it is said: "Equity abhors a stale claim, and it was incumbent upon plaintiff to show facts excusing his long delay in asserting the fraud. It is not enough to assert merely that the discovery was not sooner made. It must appear that it could not have been made by the exercise of reasonable diligence. And all that reasonable diligence would have disclosed plaintiff is presumed to have known, means of knowledge in such a case being the equivalent of the knowledge which it would have produced." To the same effect are the cases of Robertson v. Burrell, 110 Cal. 567, 42 Pac. 1086, and Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 Pac. 809.

The demurrer having been properly sustained on the grounds of laches and the statute of limitations, it is unnecessary to notice the other grounds. The complaint was verified, and it would seem from an examination of it that it

could not be amended so as to obviate the objections raised to it by the demurrer; and, besides, there was no application to amend: Robertson v. Burrell, 110 Cal. 567–579, 42 Pac. 1086; Smith v. Water Co., 14 Cal. 202. There is therefore no ground of reversal in the court's action in sustaining the demurrer without leave to amend and dismissing the action. The judgment should be affirmed.

We concur: Chipman, C.; Smith, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## YULE v. BISHOP et al.*

S. F. No. 1364; August 13, 1900.

62 Pac. 68.

**Stockholder's Liability.—Under Civil Code, Section 1473,** providing that performance of an obligation by one on behalf of the party whose duty it was to perform it, and with his assent, if accepted by the creditor, extinguishes it, an indorser of a corporation's note, who paid the same and took an assignment thereof from the payee, was not entitled to maintain an action thereon, since the debt was extinguished, and hence he could not enforce the statutory liability of stockholders for such debt.

APPEAL from Superior Court, Alameda County.

Action by John Yule against Charles R. Bishop and others. From an order granting plaintiff a new trial defendants appeal. Reversed.

E. J. Pringle, E. J. Pringle, Jr., and Fitzgerald & Abbott for appellants; John Yule in pro. per.

HENSHAW, J.—This is an action by plaintiff to enforce the statutory liability of the stockholders for a debt of the corporation. Judgment passed for defendants. Plaintiff

*For subsequent opinion in bank, see 133 Cal. 574, 65 Pac. 1094.

moved for and obtained an order granting him a new trial and from that order defendants appeal. The complaint, so far as is necessary for the consideration of the questions here presented, shows that the Consolidated Piedmont Cable Company, a corporation, borrowed from the Oakland Bank of Savings, upon its corporate note, the sum of $10,000. Before delivery of the note, Mrs. Phebe Blair placed her name upon the back thereof as an accommodation indorser. In time Mrs. Blair was called upon to pay the note, and did so. Upon payment she took from the bank an assignment of the note, "and all its rights and interest thereto, and all moneys due or to grow due thereon, and all rights of action which said bank had or held against the said Consolidated Piedmont Cable Company and against the stockholders of said corporation created or existing in favor of said bank by reason of said loan." Mrs. Blair in turn assigned and transferred to one Black the promissory note, and all rights and interest therein, and to all moneys due and to grow due thereon. Black brought an action against the corporation, and recovered judgment against it for the amount so paid by Mrs. Blair, with interest. Thereafter Black and Mrs. Blair executed and delivered to the plaintiff an assignment of all their right, title, interest and estate in and to the judgment, to the note, and to any and all rights of action against the stockholders of the Consolidated Piedmont Cable Company, created or existing by reason of the loan made by the bank. Issue was joined upon these averments, and the court found, as matter of fact, that with the note the bank's right of action against stockholders had been assigned to Mrs. Blair. This finding of fact, being in plaintiff's favor, was, of course, not assailed by him upon his motion for a new trial; and therefore, so far as it may justly be considered a finding of fact, it is not open to question on this appeal. The court further found the assignment by Mrs. Blair to Black to have been as pleaded in the complaint and above set forth. It next quoted at length the written assignment made by Black and Mrs. Blair to this plaintiff, which in terms was an assignment of the judgment and of the promissory note, and found that neither Black nor Mrs. Blair had assigned to plaintiff any right of action against the stockholders of the corporation upon account of the debt. This last finding was challenged by plain-

tiff in his motion for a new trial, and is the one which here invites particular consideration.

Mrs. Blair being an accommodation indorser upon the note so far as the bank, the actual payee of the note, was concerned, she became charged with the duties and vested with the rights of an indorser: Civ. Code, sec. 3117. But, while this was her position with relation to the bank, as to the corporation she was a surety, and in the complaint it is properly charged that she "indorsed the note as surety" to enable the corporation to obtain the money from the bank. Her rights and remedies against the corporation and against its stockholders, then, are such as belong to a surety who has paid the debt and discharged the obligation of his principal. While the attack upon the so-called findings is directed in terms to the question of the sufficiency or insufficiency of the assignments to accomplish their intended purpose, the real question in controversy goes to the nature and extent of the rights of the surety under the indicated circumstances. Thus, while plaintiff pleads and the court finds that an assignment was made by the bank to Mrs. Blair of its rights under the note, and of its rights of action against the stockholders, if, under the law of the state, Mrs. Blair was entitled to such assignment, the court, in equity, would decree her to be vested with such rights, or, so far as might be necessary to her protection in the full enforcement of her claim against the corporation, would subrogate her to the bank. As equity would do this without any formal assignment by the bank, it follows that the so-called finding of fact declaring that the bank did assign the note, and did assign its rights of action against the stockholders, is in reality more of a conclusion of law—a statement of what the court believed to be the legal rights which attached to Mrs. Blair by reason of her suretyship and her payment of the debt of her principal. It is, then, as has been said, upon the question of the nature and extent of the rights of sureties under the indicated circumstances that counsel so widely differ. Upon the part of respondent it is insisted that, whether Mrs. Blair be regarded as an indorser or as a surety, equity countenances an assignment of the principal debt paid by the surety, and will keep it alive for all purposes necessary to her protection in the collection of her demand against the principal; that, being thus subrogated to the bank, she is clothed

with all its rights and remedies, and vested with the right to enforce all of the securities which the bank itself possessed; and that, therefore, as the right of action of a creditor of the corporation against the stockholders is, in its broad sense, a security for his debt, under subrogation and equitable assignment she was vested with the same right to prosecute actions for contribution against the stockholders which the bank itself had formerly enjoyed. As against this, appellants contend that, as Mrs. Blair was in law nothing more than a surety, upon the payment by her in full of the principal's obligation, ipso facto that obligation was extinguished (Civ. Code, sec. 1473); that whatever extinguishes the obligation of the corporation, as matter of absolute law, must extinguish the independent statutory liability of the stockholders for contribution upon account of such obligation; that, by the assignment of the extinguished obligation evidenced by the note, Mrs. Blair could acquire no right of action against the corporation or against its stockholders upon account of the original debt, but that upon her payment of the corporation debt a new liability sprang at once into existence—a liability upon the part of the corporation to reimburse her for what she had expended, including necessary costs and expenses (Civ. Code, sec. 2847), and the corresponding liability upon the part of the then stockholders of the corporation, extending for three years from the date of the payment by Mrs. Blair, to contribute in proportion to their holdings toward the reimbursement of Mrs. Blair, in the event that the corporation failed so to do.

That a surety paying the debt of the principal is entitled by equitable assignment or subrogation to the benefit of every security for the performance of the principal obligation, and to enforce every remedy which the creditor had against the principal, to the extent of reimbursing himself, is an elementary principle of equity, which finds expression in sections 2848 and 2849 of our Civil Code. But whether or not the principal debt, after payment by the surety, is kept alive, and will pass to him for enforcement, is a question that has much agitated the courts, and one upon which a great contrariety of opinion has been expressed. It would unduly extend this opinion to attempt to review even the leading cases bearing upon the different sides of this question. Suffice it to say that under the earlier English decisions it was

held that the original obligation was kept alive, and that the surety in equity had the right to compel an assignment of it to him, and to enforce it according to its tenor and terms. Later, by Lord Eldon in Copis v. Middleton, 1 Turn. & R. 220, and by Lord Brougham in Hodgson v. Shaw, 3 Mylne & K. 183, the contrary doctrine was laid down, and it was declared that "when a person pays off the bond in which he is co-obligator, or bound subsidiaries, he has at law an action against the principal for money paid to his use, and he can have nothing more." Still later the law as thus declared was changed by parliament (19 & 20 Vict., c. 97, sec. 5), and reversion thus made to the earlier rule. In this country the doctrine of Lord Brougham has not met with much approval, and the strong trend of the American decisions is in favor of the law as it now obtains in England: Bisp. Eq., 4th ed., p. 297; Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286; Smith v. Rumsey, 33 Mich. 194; Lumpkin v. Mills, 4 Ga. 343; Bowen v. Hoskins, 45 Miss. 183, 7 Am. Rep. 728; The Tangier, 2 Low. 7, Fed. Cas. No. 13,744. In this state, as early as 1862, in the case of Chipman v. Morrill, 20 Cal. 130, it was decided, in effect, that by the surety's payment the principal obligation was extinguished, and that the action of the surety was upon the assumpsit which the law implies where a surety is compelled to advance money for his principal. That there might be no room for controversy, with the enactment of the code the question was laid at rest in this state by the declaration that the full performance of the obligation by any person on behalf of the principal, with his assent, if accepted by the creditor, extinguishes the obligation: Civ. Code, sec. 1473. In James v. Yaeger, 86 Cal. 187, 24 Pac. 1005, this court said: "By the payment to the payee the note became extinguished and ceased to be a binding obligation: Civ. Code, sec. 1473; Wright v. Mix, 76 Cal. 465, 18 Pac. 645. . . . . Having been paid, it became functus officio, and no action could be maintained upon it: Gordon v. Wansey, 21 Cal. 79." The same principle is enunciated in Stone v. Hammell, 83 Cal. 547, 17 Am. St. Rep. 272, 8 L. R. A. 425, 23 Pac. 703, and in Stanley v. McElrath, 86 Cal. 449, 10 L. R. A. 545, 25 Pac. 16. In this state, therefore, it seems to be well settled, both by the language of the code and by the decisions of this court under it, that full payment and performance by the surety extinguish the primary obligation;

that new rights and liabilities then arise—upon the part of the principal, to reimburse the surety for the moneys expended, with legal interest, though not according to the terms of the primary obligation, and upon the part of the surety, the right to an action in assumpsit upon the implied promise of the principal to make him whole. Since the principal obligation is thus extinguished, it cannot be with us, as it may be elsewhere, that the original obligation is kept alive, and passes to the surety by equitable assignment or subrogation. Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40, is relied upon by respondent as being opposed to these views, but that was not the case of the payment of a debt by a surety. The debt of the corporation was paid by one of its stockholders, who in his complaint asked to be subrogated to the right of the original holder of the debt to enforce the stockholder's liability. He was himself a stockholder, and interested, therefore, in the preservation of the corporate property. He was not a mere volunteer. He was not a surety. But he had, by virtue of his relations to the corporation, the right to take up the note, and to hold it and the debt represented by it, and enforce contribution among his fellow-stockholders. Under the circumstances of that case, the debt was not extinguished, while by payment on the part of the surety it certainly is extinguished, or section 1473 of the Civil Code is without meaning. But, as the liability of the stockholder to contribution for the payment of a corporate debt presupposes the existence of such debt, it must necessarily follow that when the corporation debt is extinguished the statutory liability of the stockholders at once ceases. So that in the present case, as matter of law, the debt having been extinguished by the surety's payment, the liability of the stockholders upon that debt came to an end, and neither under the doctrine of equitable assignment nor of subrogation could it have been transferred as a live and subsisting obligation to Mrs. Blair; for, as has been said, upon the full performance by Mrs. Blair the old liability was extinguished, and a new liability sprang up against the corporation and its stockholders—a liability upon an implied contract to reimburse what had been expended, including necessary costs and expenses. It was a new debt of the corporation, having its creation in and at the time of the payment by Mrs. Blair, and concur-

rently with the creation of this new debt came into existence a new liability upon the part of the then stockholders of the corporation for their contributory share of the amount of the debt thus due to Mrs. Blair. This action was framed and commenced upon the theory of the continuing existence of the liability upon the part of the stockholders after the full discharge of the corporation obligation by Mrs. Blair. As matter of law, it has been said that this could not be. It follows, therefore, that the finding of fact here assailed by respondent, and which is in effect but a conclusion of law, is legally sound. The order granting a new trial is therefore reversed.

We concur: Temple, J.; McFarland, J.

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## SMITH, Road Commissioner, v. GLENN et al.

L. A. No. 886; August 23, 1900.

62 Pac. 180.

**Highways—Dedication—Evidence.**—A County Highway Terminated at the western boundary of certain land, the terminal being marked by stone monuments sixty feet apart. The owner of the land employed a surveyor, who surveyed a strip sixty feet in width from the terminal of the highway to the eastern boundary of the land, and there placed a post at the northern and southern boundaries of the strip; and a map was made, showing the strip surveyed, with the eastern end closed, and filed for record in the county. At the time of the survey the owner of the land informed the surveyor and his children that his purpose was that a map might be made of the road, in order that, in dividing his land among his children, reference might be made to the map, to insure certainty of description, and that the county could not have the strip as a highway unless it paid for it. He told the children to farm up to the center of the road, which they did. The strip surveyed was never recorded or platted as a county road, and no highway connected the strip on the east. Held, that there was no dedication of it for use as a highway.

**Nuisance—Fence in Highway.**—Where in an Action Against a Grantee of the owner to abate a nuisance consisting of a fence erected by her on the strip, on the ground that the strip had been dedicated by her grantor as a highway, the defense was that there was no dedi-

cation, but that the survey and map were made merely that the map might be referred to in conveyances, to insure certainty of description, and the court found that the strip was not a highway, findings that the strip was not a continuation of the county road, and that it was not dedicated to the public by the owner, and not abandoned to the public, were not necessary.

**Nuisance—Fence in Highway.—In an Action Against a Grantee** of the owner to abate a nuisance consisting of a fence erected by her on the strip, it was not error to exclude the field-notes and memorandum-books of the surveyor, where it appeared that they were never shown to defendant's grantor and were not recorded, and the evidence showed that the map was made from the field-notes, and it did not appear that the notes, if admitted, would throw any additional light on the map, or the grantor's intention in having it made, and the surveyor used the field-notes in testifying, and was not restrained from stating any facts relating to the survey found in them.

**Nuisance—Fence in Highway.—In an Action Against the Grantee** of the owner to abate a nuisance, declarations of the owner of the land, while in possession, and at the time he was having the survey made, to the effect that the same was being made merely for convenience of reference in making conveyances, were admissible.

**Evidence.—Where There were in Evidence Declarations of the Owner** of the land, while in possession, and at the time the survey was being made, that the same was made merely for convenience of reference, if it was erroneous to admit declarations of the owner to the same effect made after the survey, the plaintiff suffered no substantial injury by their admission, where the fact was not brought out as to how long afterward declarations were made, and, so far as appeared, they may have been made immediately afterward.

APPEAL from Superior Court, Ventura County.

Action by Alvin B. Smith, road commissioner, against Catherine Glenn and another. From a judgment in favor of defendants and an order denying a motion for a new trial plaintiff appeals. Affirmed.

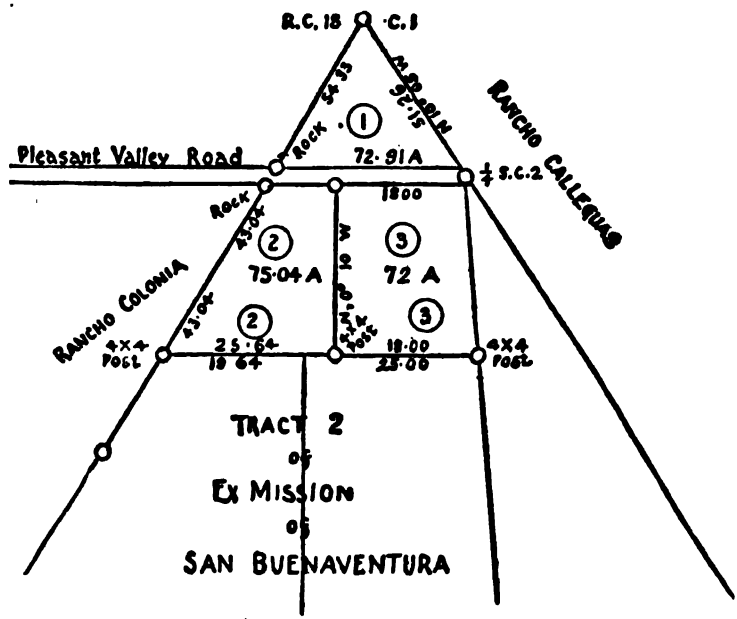
F. W. Ewing for appellant; H. L. Poplin for respondents.

CHIPMAN, C.—Action to abate a nuisance and for damages. The cause was tried by the court without a jury, and defendants had judgment, from which, and from the order denying his motion for a new trial, plaintiff appeals.

Defendants are husband and wife, and plaintiff is road commissioner of the Hueneme road district, in Ventura

county, and as such brought the action. The complaint alleges: That on December 19, 1891, one John Cawelti was the owner of a certain tract of land in said district. On that day he laid out, as part of said land, a strip sixty feet wide, as and for a public highway, and dedicated and abandoned the same to the public as a highway, and that said strip ever since has been, and is now, a public highway. That about July 15, 1899, the defendant Catherine Glenn erected along the center of said highway a wire fence, and now maintains the same, which fence encroaches upon said highway to the extent of thirty feet, being the north half of said highway, and extends along said highway for the entire length of said defendants' land, being lot 1 of subdivision of tract 2 of Rancho Ex-Mission. The court found the ownership in Cawelti, December 19, 1891; that in November, 1891, he caused the land in question, together with his other said lands, to be surveyed and subdivided, and platted by map, for the purpose of dividing and deeding his said lands to his children, and filed said map for record in said county "for the purpose of reference in making description of the parcels in the conveyances to his said children, thereafter to be made, and for no other purpose"; that it is not true that said Cawelti laid out said strip of land for a highway, or ever dedicated the same for a highway, or that it has ever been a public road or highway; that the said fence erected by defendant Catherine is not upon any public road or highway, but is on and along the line of lands of the said Catherine, as grantee and successor in interest and title of the said John Cawelti, her father. The map referred to by witnesses, and in the deeds conveying the property, shows that the easterly and westerly boundary lines of lot 1 converge at a point north of the strip of land in question. The lot is triangular; the base line being, as claimed by respondent, the center of the said strip claimed by plaintiff to be a public road. A public highway, called the "Pleasant Valley Road," approaches tract 2 from the west, and terminates at the westerly line of this tract. It is marked by stone monuments sixty feet apart on this westerly line. Thence a road had been in use many years prior to 1891, continuing across tract 2 to the easterly line of said tract 2. There the traveled tracks diverged in several directions by no well-defined road. On the

easterly boundary line, in the center of said strip of land, is a quarter-section corner. As the map is the chief reliance of appellant, as indicating the intention of Cawelti, a copy of the portion illustrating the evidence is here inserted:




This diagram is not drawn to an exact scale, but substantially represents the situation. The survey and plat were made by Surveyor J. A. Barry at the instance of Cawelti, who was personally present and aided in making the survey. Mr. Cawelti's sons Andrew and Jacob also assisted. Mr. Barry testified that he began the survey by running a random line from the western end of the strip marked on the plat as a road to the east line of the tract, and there found the quarter-section corner at the east terminus of the center line of the road. He placed a post on each side of this quarter-corner on the eastern boundary line, sixty feet apart in latitude. These posts are not indicated on the plat. He testified: "I then ran back toward the west, and took a position intended for the division line between lots 2 and 3, south of the road, and set a post in the south line of this road. At the west end of this road, in the west line of the Cawelti tract, and in the east line of the Rancho Colonia, there had already been placed by other surveys a rock set in the north

line of the road and a rock in the south line of the road, sixty feet apart in latitude. . . . . I drew a plat from my survey, and got Mr. Greenwell to do the mechanical part of making the map, which is recorded and is here in evidence, from my data and field-notes. The land lying north of the road, as shown on the plat, is lot No. 1. Immediately south of and adjoining the road are lots 2 and 3. The traveled road which I have mentioned was within the boundaries of the sixty-foot road that I located. . . . . The road which I located across this tract was the east prolongation of the Pleasant Valley road. . . . . The surface of the land across the Cawelti tract, where this road is located, is practically a level loam. . . . . The road showed by its looks that it was in use, and used by wagons and vehicles." He further testified: "Mr. Cawelti told me he was going to divide this tract into parcels, going to give it to his children and wife. This plat was being made for the purpose of placing it on record, that the description in the deeds might be by reference to it. . . . . Mr. Cawelti told me to run the line from the quarter-section corners on the east to the center of the Pleasant Valley road on the west; that would be the center of this road. I set the posts at the east end of the road; that is, I had my assistants assisting me to set the posts. There are no words of description of these posts set at the east end of the road marked on the map. . . . . I do not remember anything said by Mr. Cawelti about this road across his land being a public highway. I don't remember talking about the county road matter at all. The survey and map were made for Mr. Cawelti to enable him to divide his lands among his children. . . . . I followed his instructions in making the map. This was the only map delivered to him. I did not show him, nor deliver to him, my field-notes of the survey; nor, in my judgment, did he see any memoranda made by me in my book." It appeared from the testimony of this witness, as well as from that of others, that persons residing east of the Cawelti tract traveled this road in reaching the county seat and other of the more populous parts of the county lying west of the tract. It also appeared that there is a public road three-quarters of a mile north of the road in question, running east and west through the Calleguas ranch, and another public road running east and west about a mile south, from which fact respondent contends that there was no necessity for the road in question. Road Com-

missioner Smith (plaintiff) testified that the road in question has never been platted or recorded, or anything done to recognize it as a county road, so far as he knew, except by the map referred to. He also testified that there were no county roads connecting with this strip of land or road on the east, so far as he knew. It also appeared from Surveyor Barry's testimony that the acreage marked on lot 1 included the land to the center of the road. He testified that lot 1 contains 72.91 acres to the center of the road, and it is so marked on the plat. The foregoing is, in substance, all the evidence submitted by plaintiff. He offered in evidence the field-notes of Surveyor Barry, and his book in which they were entered, including therein a rough sketch of the plat. The court sustained an objection to their relevancy and competency, it appearing that they were not recorded, and that Mr. Cawelti never saw the field-notes, or knew what was written or sketched in the surveyor's book. Andrew Cawelti, son of the owner of the land, testified that he and his brother Jacob were the chain carriers and assisted in the survey. He testified: "To locate the line between lots one, two, and three, we started at the center of the end of the Pleasant Valley road, and ran east to the quarter-section rock. We found the rock at my father's direction. Our father told all the children that this subdivision was for the benefit of his children. He said lot No. 1 was to go to Mrs. Glenn, and told us all which lot was to go to each of us children." He further testified that the dividing line between lot 1 and lots 2 and 3 was a direct line run from the quarter-section corner to the center of the Pleasant Valley road. He testified: "At the time of the survey and afterward, he [his father] told me and my brothers and sisters that there would be no road there unless the county would buy it. He told them to farm up to the center, and if the county wanted a road it would have to buy it. After the survey he remained in possession of the land on both sides of the road up to his death," which occurred October 24, 1893. The land was farmed up to the road as used. The witness continued: "The deeds for the lands were made by my father to the children immediately after the survey, and placed in the hands of A. Levy by my father for the children, to be delivered to them at father's death; and they were kept there by Mr. Levy until father died, and then turned over to them, including Mrs. Glenn."

Jacob Cawelti, who assisted in the survey, testified, as did his brother Andrew, as to what his father said about the county buying a road if it wanted a road there. The defendant, Mrs. Glenn, testified: "He [her father] told me, when I took possession of the place, to cultivate right up to the line, and not to give the road, and, if the county wanted a road, it could buy it. My father remained upon the place and in possession until his death. After his death I came into possession of lot 1. I caused this fence to be built on the south line of lot 1." The deed to defendant Catherine is dated December 19, 1891, the day the map or plat was recorded, and the description of the land is: "Being a part of tract No. 2 of the Rancho Ex-Mission of San Buena Ventura, and being lot No. 1 of said tract No. 2, as subdivided for John Cawelti by J. A. Barry, surveyor, November, 1891, containing seventy-two and 91/100 acres (72.91), and delineated on Barry's subdivision map as lot 1, which said map was recorded December 19th, at 10:55 A. M., in book 3 of miscellaneous maps, page 30, Ventura county records, and to which map and the record thereof reference is hereby made." The will of John Cawelti referred to the map, and the decree of distribution after Mr. Cawelti's death contained the same description as in the deed to Mrs. Glenn, and so also did the homestead declared on the land by Mrs. Glenn in 1894. Other children of deceased corroborated the testimony of the children already shown, and one of them (Mrs. Johnson, a daughter) testified that she occupied lot 3, and caused trees to be planted on the south side of the road. She said she planted them on the north side of her orchard to protect it from the wind and sand. The evidence shows that this strip of land was traveled over as it had been before the survey by Barry, and after Mrs. Glenn built her fence there was travel along the strip on the south side of it. There were no acts of Cawelti shown which indicated a dedication before the survey, and nothing bearing upon dedication prior to the survey, except the fact that the public had used the road.

1. The real issue in the case is, Was there a public highway at the time, as alleged, over this strip of land? If not, it is immaterial whether defendant encroached upon it. Other issues, which appellant complains were not found upon, also become immaterial, if defendant was rightfully in possession of her own when she built the fence constituting the

alleged obstruction. We think there was evidence to justify the findings. Appellant cites several decisions of this court, from which he deduces the rule that "when the owner subdivides his tract, makes a map of subdivision, with a road delineated upon it, records that map, and abandons the land over which the road passes to the public use, he thereby offers to dedicate the road, as shown upon the map, to the public for a highway." "These acts," it is claimed, "in themselves unequivocally manifest an intention to dedicate the road"; citing Griffiths v. Galindo, 86 Cal. 192, 24 Pac. 1025; Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; People v. Marin Co., 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203. It is claimed, also, that the acceptance of the public was established by the continuous use of the road by the public after the map was filed; citing Smith v. City of San Luis Obispo, 95 Cal. 470, 30 Pac. 591; Hall v. Kauffman, 106 Cal. 451, 39 Pac. 756. The use by the public would have been a much stronger circumstance if it had been a new use of the land, following an apparent dedication of it. But the use was the same as before the map was filed, and there is nothing in the case to indicate that the public continued the use upon the assumption that the road was dedicated by the filing of the map, while all the evidence shows that the purpose of filing the map was to furnish a convenient means of referring to the tracts which the owner intended to convey, and there is no evidence that he had any other intention. The evidence is all one way that his intention, so far as expressed, was that there should be no road there unless the county paid for it. It will be observed that the map closes the road at its east end, and the evidence is that there is no public highway east from this point, and that there was no necessity for the road, inasmuch as there was a parallel road on the north and on the south within short distances. The evidence is that, to make the acreage of lot 1, the base line of the triangle must be the center of the road, and the uncontradicted evidence is that this line was intended to divide lot 1 from lots 2 and 3. It is not reasonable to infer from the evidence an intention to dedicate a road across this land which would have no outlet east, and which the map closed at the east end, making, as respondent well suggests, a mere cul-de-sac of this strip of land. The most that can be claimed for the map in support of appellant's contention is that it

tends to show dedication, but there is a clear conflict as to the intention of the owner, there being the map and the continuous use of the land for a road on the one side, and the positive testimony of witnesses on the other. Even the map itself may be said to testify both ways. The rule stated by appellant need not be controverted, and the case before us does not seem to call for comment on the decisions of courts cited by the parties respectively. The question being mainly one of fact, we think the evidence is sufficient to justify the findings.

2. The finding, in effect, is that the strip of land in question is not a continuation of the Pleasant Valley road, and that this strip was not dedicated to the public, and that Cawelti did not abandon it to the public. Special findings on these points were not necessary.

3. It was not error to exclude the field-notes and the memorandum-book of Surveyor Barry. They were never shown to Cawelti, and were not recorded; and, besides, the evidence shows that the map was made from these field-notes, and it was not shown that the latter, if admitted, would throw any additional light upon the map, or Cawelti's intention in having it made. Barry used his field-notes freely in testifying, and it does not appear that he was restrained from stating any fact relating to the survey found in them. There was no evidence of any discrepancy, which was not explained by Barry, between the map and the field-notes, as in Whiting v. Gardner, 80 Cal. 78, 22 Pac. 71, and Burke v. McCowen, 115 Cal. 481, 47 Pac. 367.

4. The declarations of the owner of the land while in possession, and at the time he was having the land surveyed, were admissible (Tait v. Hall, 71 Cal. 149, 12 Pac. 391; Lewis v. Burns, 106 Cal. 381, 39 Pac. 778); and the question of highway or no highway was one of fact, to be passed upon as such by the court (Tait v. Hall, supra; Smithers v. Fitch, 82 Cal. 153, 22 Pac. 935).

5. Appellant objected to the declarations of the owner, while in possession, made to his children after the survey was completed, and after the map was filed and the deeds delivered in escrow. The court admitted the evidence, and this ruling is urged as error. The evidence is that Mr. Cawelti told all his children while he was making the survey, and contemporaneously with making the deeds, that there was to

be no county road along this strip of land unless the county paid for it. Even if it is conceded that his declarations made afterward were inadmissible, it is evident that plaintiff suffered no substantial injury by their admission. The fact is not brought out as to how long afterward these declarations were made to which appellant objected. So far as appears, it may have been immediately afterward.

After a careful examination of all the evidence, we are of the opinion that the findings were sustained by the evidence, and that appellant suffered from no error of the court. The judgment and order should therefore be affirmed.

We concur: Gray, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## IOWA AND CALIFORNIA LAND COMPANY v. HOAG et al.*

L. A. Nos. 685, 686; August 28, 1900.

62 Pac. 189.

**Foreign Trustee—Capacity to Sue.**—A Trustee Appointed by a court is thereby vested with no authority to maintain an action outside the jurisdiction of his appointment, and such authority will rarely be recognized by a foreign court, in absence of a statute expressly authorizing it.

**Foreign Trustee—Substitution of Plaintiffs.**—Where an Action was commenced by a foreign trustee who was without capacity to sue in the jurisdiction where it was brought, and whose appointment was also subsequently held void by the court which made it, no substitution of parties plaintiff can render the action maintainable.[1]

* For subsequent opinion in bank, see 132 Cal. 627, 64 Pac. 1073.

[1] Cited in Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 993, where, however, the court decline to commit themselves on the point it is mentioned as upholding.

Cited and followed in Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 493, 132 N. W. 993, a case where the corporation, a Washington one, was dissolved under the laws of that state, its property becoming vested in trustees there for administration for the stockholders. It was held that proceedings could not be had in Minnesota by a resort to receivers in lieu of the trustees.

APPEAL from Superior Court, Riverside County.

Actions by the Iowa and California Land Company, substituted plaintiff, against Lillian D. Hoag and Abram Hoag. Judgment for plaintiff and defendants appeal. Reversed.

Chas. R. Gray for appellants; E. W. Freeman and Rolfe & Rolfe for respondent.

HENSHAW, J.—These actions were both actions to foreclose mortgages executed by the defendants to secure their promissory notes. The notes and the securities passed by sundry transfers and assignments to this plaintiff. The questions involved upon these appeals are identical, and the cases may therefore be considered and decided together.

The defendants executed their promissory notes, secured by mortgages upon lands in California, to the Union Loan and Trust Company, a foreign corporation, organized under the laws of the state of Iowa. The Union Loan and Trust Company, to secure its debenture bonds, deposited with one Garretson, as trustee, certain notes and mortgages, among which were the ones executed by these defendants. Thereafter the Union Loan and Trust Company became insolvent, and made an assignment to one Hubbard, as assignee for the benefit of its creditors, of all of its remaining right, title and interest to the securities under the control of Garretson, trustee. Garretson in turn became insolvent, and the creditors of the Union Loan and Trust Company filed a bill in equity in the district court of the state of Iowa for the county of Woodbury (a court of general jurisdiction) setting forth these facts, and praying for the removal of Garretson, and the appointment of some fit and proper person in his place. The Iowa court rendered its decree in accordance with the prayer of its petitioners, ousting Garretson from his trusteeship, and appointing F. B. Hutchins in his place, and empowered him to use all proper means to enforce the collection of the securities so intrusted to him. Under this appointment, Hutchins, as trustee, commenced his action in the superior court of this state to foreclose these mortgages. Thereafter, and during the pendency of this action in this state, certain other creditors of the Union Loan and Trust Company, and holders of the debenture bonds of that company, attacked and opposed

the order and decree of the court appointing Hutchins as trustee, upon the particular ground that the court by its order and decree had enlarged the powers of Hutchins as trustee over and above the powers conferred by the articles of trust under which Garretson had been appointed. They pleaded that the court's order authorizing and empowering Hutchins to employ counsel and maintain suits to enforce collections of securities intrusted to him was null and void. After hearing, the district court of Iowa (the same court which had appointed Hutchins trustee) declared and adjudged that its former decree in the premises was a nullity, and that Hutchins was without authority or capacity to sue, and revoked its order appointing him trustee, and in place thereof appointed him receiver of the property of the insolvent corporation, conferring upon him the powers with which such an officer is usually clothed. Hutchins then, in turn, sold and transferred the notes and mortgages here in question to other parties; and by mesne transfer they came into the ownership of the Iowa and California Land Company, a corporation organized under the laws of the state of Iowa. These matters having been shown to the California court by amended and supplemental pleadings, an order of substitution on behalf of the Iowa and California Land Company in the place of Hutchins, trustee, was asked for and obtained. By this substituted plaintiff these actions were prosecuted to judgment.

The principal question urged upon this appeal goes to the right of Hutchins, the trustee, to commence and maintain these actions. A demurrer to the complaint was presented, urging, upon other grounds, the lack of capacity of plaintiff to sue. It is well settled that trustees under judicial appointment, like executors and administrators, have no power to maintain actions outside of the territorial limits of their appointment: Perry, Trusts, sec. 71; Redf. Wills, p. 24. So well settled is it, indeed, that the supreme court of Iowa, in considering this identical question, where the trustee of a foreign corporation sought to maintain an action within the state of Iowa against citizens of that state, declared: "We meet, then, so far as this question is concerned, an unbroken array of authorities, both elementary and adjudicated, extending through a long course of time, denying the plaintiff the right to maintain this action, except in so far as the rule

may be influenced by the fact that in certain cases of receivership, through a spirit of comity, the courts have extended the rule." And that court declined to extend the rule applicable to receivers to the case of trustees: Ayres v. Siebel, 82 Iowa, 347, 47 N. W. 989. See, also, Lewis v. Adams, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833; High, Rec., 3d ed., sec. 239 et seq. Where a trustee, then, derives his authority from some act of law or judicial appointment, it seems well settled that his authority is coterminous with the jurisdiction or the law to which he owes his appointment, and that such authority will rarely be recognized by a foreign jurisdiction, in the absence of a statute expressly authorizing the court so to do. The case, of course, is different where the trustee derives his title by direct appointment from the trustor: Curtis v. Smith, 6 Blatchf. 537, Fed. Cas. No. 3505. In this instance the trustee belongs to the former class, and we are referred to no law of this state either authorizing or empowering our courts to recognize the capacity of such a trustee to maintain suits against our citizens. But even if, under an extreme indulgence of the spirit of comity, this court were inclined to extend the rule, because of the very obvious hardship which its enforcement discloses in this case, an irresistible reason arises to prevent it; for to do so would not be to clothe the trustee in this (a foreign) jurisdiction with the same right to maintain an action which he possessed in the jurisdiction of his appointment. It would be to confer upon him a power and authority which the very court that appointed him expressly denied that he possessed. For it is to be remembered that the court of Iowa, after the commencement by Hutchins of this action in California, revoked his appointment as trustee, and expressly declared that he had no authority whatsoever to maintain suits, and that its attempt to confer upon him such authority was null and void. Since Hutchins, as trustee, was without standing in the courts of this state, and had not the capacity to sue, no substitution of a person with such capacity in his place and stead could avail to give validity to his action. Hubbard, the assignee for the benefit of creditors, after the appointment of Hutchins, the trustee, and after the commencement by Hutchins of his suit, assigned such interest as he had in these notes and securities to Hutchins; and it is argued that Hutchins was entitled to maintain his action by virtue of his ownership of the notes and mort-

gages thus derived. But Hubbard, the receiver, transferred them not to Hutchins as an individual, but Hutchins as trustee. There is no pretension that Hutchins acquired any private ownership in the property, and the action which he brought, which is merely by himself as trustee, negatives any such claim.

Objection is further made that the demurrer upon the ground of plaintiff's lack of capacity to sue should be disregarded, in that it did not specifically state the grounds and reasons for such incapacity. But it is sufficient in passing that question to say that the same objection was made in a different form, upon motion for nonsuit.

The judgments and orders appealed from are therefore reversed.

We concur: Temple, J.; McFarland, J.

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## PEOPLE v. ALLEN.

Cr. No. 602; September 1, 1900.

62 Pac. 170.

**Embezzlement—Information—Variance.—When an Information** for embezzlement aptly charges the defendant with having received the money of another, and willfully and feloniously appropriated it to his own use, additional averments describing the check or instrument upon which he obtained the money are immaterial, and a discrepancy between such description and the proof does not constitute a variance.

APPEAL from Superior Court, San Luis Obispo County.

James Allen was convicted of embezzlement and appeals. Affirmed.

Albert Nelson, A. J. Monohon and Graves & Graves for appellant; Attorney General Ford for the people.

COOPER, C.—Defendant was convicted of embezzlement, and has appealed from the judgment and from an order denying his motion for a new trial.

1. It is claimed that there is a variance between the information and the proof as to the instrument described in the information. We are simply told by appellant's counsel that "the variance is a fatal one." No reason is given as to the theory upon which counsel claim that the variance is fatal, and upon examination we fail to discover any theory upon which we could so hold. The information charges the defendant with having on the tenth day of January, 1898, in the county of San Luis Obispo, willfully and feloniously embezzled to his own use the sum of $110, lawful money of the United States, then and there the property of one M. F. Pimenthal. Defendant was convicted "of the crime of embezzlement, in embezzling money exceeding in value the sum of fifty dollars." The information sets forth with more particularity than necessary the facts and circumstances connected with the alleged embezzlement, and, among other things, states that Pimenthal delivered and indorsed the order or check described in the information to defendant, with directions to defendant to collect the same, and deposit the proceeds with the Andrews Banking Company, in San Luis Obispo, to the credit of Pimenthal; that defendant presented said check or order for payment, and it was paid to defendant, and he received thereon $110, which he feloniously appropriated, contrary to the trust reposed in him. The fact that defendant collected the money on the order precludes him from claiming that the order was indefinite, or different from the description of it contained in the information. The gist of the offense was receiving the money of Pimenthal and appropriating it to defendant's use. The means by which defendant received it, as detailed in the information, were wholly immaterial. If the information had left out all descriptions of the order or check, it would have charged a public offense. As the check was a wholly immaterial quantity in the elements necessary to constitute the offense charged, it becomes unnecessary to discuss the question as to the alleged variance.

2. It is next said that the witnesses Venable and Meredith "were permitted to give incompetent evidence as to the payment of the check by the Commercial Bank to the defendant, and the nondeposit of the amount in the Andrews Bank." We are not told in defendant's brief why the evidence was incompetent, counsel having aided us only by the statement,

"This is clear error." It does not appear either clearly or otherwise to us that the evidence was incompetent. It was necessary for the prosecution to prove that defendant received the money, and failed to deposit as directed, or account for it in any manner. The witnesses were the president and bookkeeper, respectively, of the bank. They testified that defendant received the $110 on the order, and that he did not deposit it in the bank.

3. Our attention is invited to folios 130 to 138. It is said that by examining the above portion of the record it will appear that the defendant was not allowed to show by proper cross-examination the animus of the witness Cuelho. We have examined the record, and find no error in the ruling of the court as to any question asked in cross-examination. The only question asking for a fact to which an objection was sustained was, "Q. How did you come to town?" It does not appear that it was very material for the jury to know how the witness came to town. Counsel for defendant, after asking a question or two, to which objections were sustained said: "We propose to prove—" The counsel for the people objected to any proposals to prove in cross-examination, and the court sustained the objection. It does not appear that any question was asked in cross-examination tending to show the animus of the witness.

This disposes of all the assignments of error in defendant's brief, and we have not the time or the inclination to look through the record for others. The judgment and order should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## PACIFIC PAVING COMPANY v. REYNOLDS et al.

S. F. No. 1556; September 14, 1900.

62 Pac. 212.

**Street Improvements.—Within Ten Days After the Expiration of the Time** for the publication and posting of the resolution of intention to order a street improvement, the owners of a majority of the property abutting on the proposed work made their written objection to the same, and delivered it to the clerk of the board of supervisors, who indorsed thereon the date of its reception. No other resolution or action of the board was taken, but after six months from the filing of such protest it passed a resolution ordering the work to be done. Held, that the board of supervisors had no jurisdiction to order the work.[1]

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the Pacific Paving Company against Reynolds and others on a street assessment. From a judgment in favor of plaintiff defendants appeal. Reversed.

Sullivan & Sullivan for appellants; Gunnison, Booth & Barnett for respondent.

PER CURIAM.—Action upon a street assessment. Judgment was rendered in favor of the plaintiff, and the defendants have appealed therefrom. Within ten days after the expiration of the time for the publication and posting of the resolution of intention to order the work, the owners of a majority of the property fronting upon the proposed work made and delivered to the clerk of the board of supervisors their written objection to the same, and he thereupon indorsed thereon the date of its reception by him. No other resolution or action of the board was taken, but after the expiration of six months from the date of filing of said protest it passed a resolution ordering the work to be done. Under the prin-

[1] **Cited** and followed in Thomason v. Carroll, 132 Cal. 149, 64 Pac. 263, where the point is gone into and explained quite elaborately.

Cited and followed in Pacific Paving Co. v. Gallett, 137 Cal. 176, 69 Pac. 986, where the court says the case before it cannot be distinguished from Thomason v. Carroll, 132 Cal. 149, 64 Pac. 263.

ciples declared in City Street Improvement Co. v. Babcock, 123 Cal. 205, 55 Pac. 762, the board of supervisors did not have any jurisdiction to order the work to be done, and upon the authority of that case the judgment is reversed.

## PEOPLE v. LEIPSIC.

Cr. No. 656; September 17, 1900.

62 Pac. 311.

**Embezzlement as Bailee—Insufficiency of Evidence.**—A defendant cannot be convicted of the embezzlement of money as bailee under Penal Code, section 507, upon evidence which shows without contradiction that he received the money from the complaining witness to be invested for her in stocks, and that he so invested it, and that if he was guilty of any offense it was the conversion of the stocks, the relation between the parties as to the money being one of agency, and not of bailment.[1]

APPEAL from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Prosecution of Benjamin Leipsic for embezzlement. From a judgment of conviction defendant appeals. Reversed.

J. N. E. Wilson and Raymond Barry for appellant; Attorney General Ford for the people.

CHIPMAN, C.—Defendant was convicted of the crime of embezzlement, and was sentenced to five years' imprisonment at San Quentin. He appeals from the judgment and from the order denying his motion for a new trial. There is no brief on file for the people. The prosecuting witness and the defendant were the only witnesses sworn at the trial. Defendant insists that the evidence wholly fails to sustain the verdict of guilty of the offense charged in the information, and our conclusion is that he is right in this contention. The

[1] Cited and followed in State v. Mispagel, 207 Mo. 573, 106 S. W. 517, where it was held that a charge of embezzlement or larceny of money is not sustained by proof of the embezzlement or larceny of a draft or check.

crime charged was that on July 24, 1896, at San Francisco, defendant "was then and there the bailee of Mary Feeney, and as such bailee was then and there intrusted by said Mary Feeney with the following property and money of her, the said Mary Feeney, to wit, one hundred and ninety dollars, lawful money of the United States"; and that he received said property as bailee, and while so intrusted did on said day willfully, etc., "embezzle, convert, and appropriate the same to his own use," etc.

The court correctly instructed the jury that if they found from the evidence that the defendant received this money from Mary Feeney for the purpose of investing it for her in mining stocks, and that he did invest said money for her or for her benefit in mining stocks, and thereafter he fraudulently converted said mining stocks to his own use, then he cannot be convicted of this charge. In the instruction marked "7" the court in effect, and correctly, charged the jury that, before they could convict the defendant, they must be satisfied beyond a reasonable doubt (1) that during the period covered by the transaction in question the defendant was the bailee of the complaining witness, Feeney; (2) that she was the bailor of defendant; (3) that defendant as such bailee, and in the course of his relations with the complaining witness as bailee, received the $190 in money from her as bailor, and feloniously converted the said money to his own use, with intent to steal it, without her knowledge or consent; and (4) that prior to lodging the complaint in this case against defendant she, as bailor, demanded from him the return of the money, which he feloniously and fraudulently failed to do.

Defendant was engaged in selling milk, and Mrs. Feeney was one of his customers. She had known him for ten years, and he had previously to the present transaction attended to business for her. He bought some real estate for her. She had other stock transactions, and one with defendant, before this one. She was familiar with the stock board transactions, and understood buying stock on margin and how assessments are kept up. As to the transaction in question, she testified that defendant in July, 1896, told her he had a point on a stock called "Challenge," and would double her money inside of thirty days. She had no money, but had some collaterals, on the security of which she borrowed $190, and gave the money to him. "He said he would buy this stock that he got

a point on. . . . . He sold that stock out at another time, and bought another stock. I saw him about a week afterward, and he told me he had bought the stock. He said he held the stock. I never saw the stock. . . . . I demanded the stock or some money about a year after the first transaction. This stock went up to the figure that he bought it at, and I told him to sell the stock then that he said he bought. He told me that he could not sell it at that time, because it had been garnished. I asked him how could my stock be garnished for his debt, and he told me that the stock was at the broker's in his name. I trusted him up to that. . . . . That was the first time he informed me that the stock had never been in my own name. I demanded of him to sell the stock and give me the money—whatever money that was coming to me out of it. . . . . I think this was about 1897. It must be 1898 at that time. I cannot remember when, about in 1897, that I had any talk with him about the stock. Every once in a while I would talk to him about the stock." On cross-examination she testified that she knew he had the stock on margin, and that she paid him money "to keep up the margin." On redirect examination, she testified that she put up money five or six times for margins or assessments, during which time he told her he had this stock. "I asked him to sell the stock. I was tired of paying assessments on it. Q. What did he say then? A. He said he would keep it until it went up to what he paid for it. Q. Did it go up? A. Yes; and then I sent him word to sell it." On recross-examination she testified that she had only defendant's word that he had bought the stock. "Q. That is the way these transactions were done with you right along? A. Yes; he told me. I took his word. Q. You say upon these other transactions there was nothing occurred to attract your suspicions? A. I was too honest myself to suspect that he was dishonest. Q. What put it in your head about a year ago to arrest this man? A. I commenced to think that he was not treating me right when the stock went to $2.50. Then I commenced to think myself that he was not dealing with me right. Q. It was purely a matter of suspicion? A. Yes."

The defendant testified in his own behalf that they were both dealing in stocks. He received the money from her, and invested it in five hundred shares of Challenge. They both had the same broker—one Coleman. She had several times sent

him with an order to Coleman for her, and sometimes went herself to him in person. She told Coleman that he should act on any order witness gave for her. They finally quit dealing through Coleman. She turned over her account to witness, and said he could act for her. Witness closed up the margins, and changed his account to Broker Gosliner, to whom he gave the order for five hundred shares of Challenge Consolidated, at fifty eight. "The $190 was the margin. The stock came close on to $300." He then describes with some particularity the ups and downs of the stock, and his frequent reports to Mrs. Feeney; that he also bought for her some California Consolidated at $1.85, and that there was an assessment on it while she had it. He testified: "I told her that the margin I had would hold it as it was. It did go to $2.50, so I came to her house. I said, 'Mary, the stock to-day is selling for $2.50.' She says, 'Shall I sell it?' I said, 'If you heard the stock was going to $5, I would advise you to hold it.' So she says, 'I will leave it to you'; and the stock went down." He then describes the fluctuations in this stock; that assessments were levied, part of which and a part of the margin that had to be kept good she paid; that it finally went down to $1.10; more assessments came and more margins were demanded; and the result was that the stock was sold out. Defendant tells a straightforward story, entering into particulars as to the entire transactions from 1896 to the early part of 1898, showing that as late as December, 1897, Mrs. Feeney paid money through defendant to preserve her holdings, and this was a year and a half after the transaction in question. Mrs. Feeney was called in rebuttal, and was asked but one question, which was if she had ever authorized or given a written order to Coleman to have her account transferred. Her answer was not responsive to the question, but she answered that defendant told her Coleman was not an honest man, and advised her to transfer the account to him, which, in effect, was an admission that she had given the order. She made no denials whatever of any fact to which defendant had testified. She did not call Coleman as a witness, nor give any explanation for not doing so. Defendant testified that Gosliner had gone to the Klondyke, and that he had inquired at the Pacific Stock Exchange, where Gosliner was a broker, for his books, and could learn nothing about them.

I have given the evidence with greater particularity than is usual, for the reason that in no other way could the nature of the transaction be correctly interpreted. Defendant is charged as bailee, under section 507 of the Penal Code, and not as a clerk, agent or servant, under section 500. It seems to me that the testimony fails entirely to establish the guilt of defendant as charged in the information. The evidence shows the relation of agency (Civ. Code, sec. 2295), and not that of bailee (Civ. Code, sec. 1813 *et* seq.). It also shows that the money received by defendant was invested in stocks for the benefit of Mrs. Feeney, and that, if defendant converted any of her property, it was the stocks, and not the money. The verdict was against both of the instructions above noted, and the conviction is not sustained by the evidence. The judgment and order should be reversed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

## SIMS v. PETALUMA GASLIGHT COMPANY.*

S. F. No. 2215; September 18, 1900.

62 Pac. 300.

**Gas Plant.—Where the Contract Set Out in the Complaint,** in an action for placing apparatus for the manufacture of gas in a gasworks, did not show a stipulation that the cost of materials for the manufacture of gas should not exceed a certain sum, and the answer did not deny that the contract was as alleged, a finding that the plant was completed according to the contract would not be reversed on appeal, on the ground that the evidence failed to show that the plant would produce gas at the agreed cost.

**Gas Plant.—Where, in an Action for Installing a Gas Plant,** the contract having required the apparatus to produce three thousand feet of gas per hour of a certain candle-power, the evidence was conflicting, a finding for plaintiff would not be reversed on appeal.

**Gas Plant.—In an Action to Recover for Installing** apparatus for the manufacture of gas in a gasworks, evidence as to whether the

*For subsequent opinion in bank, see 131 Cal. 656, 63 Pac. 1011.

plant added anything to the value of the original plant was immaterial.

**Corporation.**—Where the President of a Corporation, Owning a Controlling interest in the stock, executed for the corporation a contract between the corporation, himself and another, the contract was not invalid, as in violation of a trust relation.

**Gas Plant.**—In an Action to Recover the Contract Price for installing apparatus in gasworks, it was not necessary to prove any demand, since the bringing of the action was a sufficient demand.

APPEAL from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by John F. Sims against Petaluma Gaslight Company. From a judgment in favor of plaintiff and an order denying a motion for a new trial defendant appeals. Affirmed.

Lippitt & Lippitt for appellant; Nowlin & Fassett and A. R. Cotton for respondent.

GRAY, C.—Defendant appeals from a judgment in plaintiff's favor and from an order denying its motion for a new trial. This action was brought to recover $4,000 alleged in the first count of the complaint to be due under a contract whereby the assignors of plaintiff, Lewelling and Van Syckel, agreed to and did build and erect certain water-gas apparatus at the gasworks of said defendant in Petaluma, for the purpose of manufacturing gas from crude oil or distillate by a process known as the "Van Syckel Water-Gas System." It is also alleged in said first count that the work in the construction of said gas plant was to be done in a workmanlike manner, and said plant was to have a capacity of three thousand cubic feet per hour of twenty-two to twenty-three candlepower gas, etc.; also that by the terms of said agreement defendant was to pay said Lewelling and Van Syckel therefor the sum of $4,000 in certain amounts and on certain dates therein alleged. The second count of the complaint is in the nature of a common count for the work and labor and materials furnished defendant by said assignors of plaintiff in the construction of said water-gas apparatus, which are alleged to be of the reasonable value of $4,000. The answer does not deny the making of the contract as alleged in the

complaint, but, in addition to some denials of mere conclusions of law, it denies that plaintiff's assignors "finished or completed the erection and construction of the said plant according to the terms of the agreement entered into and set out in said plaintiff's complaint; but defendant alleges that said gas plant constructed by plaintiff's assignors did not and does not make the quantity of gas stipulated for in said agreement, and does not and did not make a gas of twenty-two or twenty-three candle-power." In answer to the second count of the complaint, the defendant denies that the work, labor and materials furnished are of any value; also denies that $4,000 was agreed to be paid therefor; and alleges "that the said apparatus is of no value, and does not and will not make gas in quantity and quality according to the terms of said contract." There is no denial that the labor, service and material were performed and furnished as alleged in said second count. For a "separate answer," defendant alleges "that the said S. W. Van Syckel, on the thirty-first day of July, 1896, purchased of I. G. Wickersham, then the owner thereof, all the stock of the said Petaluma Gas Company, except five shares, for the sum of sixteen thousand five hundred dollars, paying thereon the sum of one thousand dollars, and giving his note for the balance, payable in two years, at six per cent interest; that to secure the payment of the said note S. W. Van Syckel transferred the stock to the said I. G. Wickersham, and agreed, as a further security for the payment thereof, to erect and attach to the said plant of the said Petaluma Gas Company his water-gas system; that, while so the owner of the whole stock of the said gas company as aforesaid, he entered into the agreement set out in the plaintiff's complaint with himself and the said Lewelling to construct the said water-gas system; that no demand has ever been made for the payment of the said sum of four thousand dollars, or any other sum; that the said S. W. Van Syckel neglected to pay the said indebtedness to the said I. G. Wickersham, and the said property reverted to the said I. G. Wickersham, the said S. W. Van Syckel having the use and occupancy of the said property during all the time since the said contract without other consideration." The pleadings were verified. The case was tried before the court without a jury, and the findings affirm the truth of the allegations of the complaint, and negative the affirmative allegations of the

answer, except those of what is denominated the "Separate Answer," which are all found to be true, except that the allegation that Van Syckel entered into an agreement with himself and Lewelling is found to be untrue.

If we understand appellant's argument, it is directed mainly to the findings, the contention being that they are not supported by the evidence. The first finding is to the effect that the gas plant was finished and completed according to the terms of the agreement mentioned in the first cause of action pleaded. In the contract as pleaded nothing is said as to the cost of the gas, and, there being no denial that the contract is as stated in the complaint, it was not necessary to prove or find the cost of making the gas. There is perhaps a variance between the contract as alleged and as proved at the trial, for the contract introduced in evidence at the trial contained a provision, in addition to those stated in the complaint, to the effect that "the cost of materials for such gas shall not exceed sixty-five cents per one thousand cubic feet, said materials to include all that used in heating generators and in making gas," etc.; but no objection was made to the contract when offered in evidence, and no attempt was made at the trial to take advantage of this variance in any way. The contract must be treated on this appeal to be, in substance and in form, as admitted in the answer, by failure to deny that it was as set out in the complaint. Therefore the objection that the evidence fails to show that the plant would not produce gas at a cost for materials of sixty-five cents per one thousand cubic feet cannot, on the pleadings as they stand, be held to be a ground of reversal.

As to appellant's objection that the evidence failed to show "that the plant would make three thousand feet per hour," Van Syckel testifies that "the capacity of the apparatus built there was three thousand feet and over per hour, of twenty-two to twenty-four candle-power." "I know its capacity, because I built it and because I operated it." William Mills, a witness for defendant, testified on this subject: "Ordinarily the machine would never make three thousand feet per hour. It would be done by an extra spray of oil, but never could make it on an average since I have seen it. I have worked the machine ever since it was put up, or soon after, and in all that time it ordinarily has not had the capacity to make three thousand feet per hour." "It has twice, to my knowl-

edge, made three thousand cubic feet per hour." In view of the foregoing evidence, notwithstanding some testimony contradictory thereof, we cannot say that the trial court was not warranted in the conclusion that the plant had "a capacity of three thousand cubic feet per hour, of a twenty-two to twenty-three candle-power gas," and consequently that the contract had been in that respect complied with by plaintiff. Upon the same evidence the trial court could find that the allegations of the answer to the effect that the plant does not make the quantity of gas stipulated were untrue.

The second and third findings affirm the truth of the second count of the complaint, and it is not seriously contended that these findings do not find support in the evidence; but it is contended that the defendant was by the court denied the right to rebut the evidence of the plaintiff, upon which the third finding was based, as to the value of the plant constructed by plaintiff's assignors. This contention is based on the action of the court in sustaining an objection to the following question: "Has this plant been any addition to the original plant for making gas, or adds anything to the value of that plant?" The objection to the question was properly sustained. The value of the original plant, or whether it had been added to, was not a proper subject of inquiry in this case. An answer to the question would not tend to establish the value of the plant involved in this suit.

The matter contained in the separate answer constituted no defense to the action, and the finding of its truth, and the evidence offered to support it, were alike immaterial, and may for that reason be entirely disregarded on this appeal, as they should have been on the trial.

The appellant presents many authorities and some argument in support of the proposition which we quote from its brief, as follows: "It is a well-established principle of law, coming down to us through the Roman, civil, and common law, that a trustee cannot enter into a contract with himself in the disposal or management of his beneficiaries' interest." It is not necessary to discuss the proposition thus laid down, for the reason that there is no pleading upon which to base such a discussion, and it is merely a moot question in the case. It is not alleged in the answer that either of the assignors of plaintiff was at any time a director of the defendant. Nor is there any allegation in the answer upon which

to base a showing that the contract relied on in the suit is either void or voidable by reason of having been made by a trustee for his own private benefit and in violation of his duty as trustee. Nor was any such showing made upon the trial. All that was shown in this direction is that S. W. Van Syckel, as president, signed the name of the corporation defendant to the contract. Certainly that fact, standing alone, could not show the contract invalid for violation of the trust relation. Nor would the added fact that such president owned a controlling interest in the stock of the corporation affect the contract. The bringing of the action was itself a demand for the $4,000 sued for, and it was not necessary to allege or prove any previous demand.

The admissions of the pleadings, together with the evidence, support the material findings, and these findings dispose of the case as presented by the pleadings, and in turn support the judgment rendered. The rulings of the court on objections to questions asked the witnesses were free from error. The judgment and order appealed from should therefore be affirmed.

We concur: Chipman, C.; Smith, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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## BANK OF WOODLAND v. CHRISTIE et al.

S. F. No. 1632; September 29, 1900.

62 Pac. 400.

**Mortgages—Crops—Foreclosure.—Under a Mortgage of Land,** "together with . . . . the rents, issues, and profits thereof," the right of the mortgagor to dispose of the crops growing thereon is not devested by foreclosure proceedings until sale under the decree.

APPEAL from Superior Court, Lake County; R. W. Crump, Judge.

Suit to foreclose a mortgage by the Bank of Woodland against G. W. Christie and others. From an order refusing to appoint a receiver plaintiff appeals. Affirmed.

Thos. B. Bond for appellant; R. J. Hudson for respondents.

SMITH, C.—Appeal from an order refusing to appoint a receiver. The plaintiff recovered judgment to foreclose a mortgage executed to it by the defendant G. W. Christie, mortgaging to the plaintiff a certain tract of land, specifically described, "together with the tenements," etc., "and the rents, issues and profits thereof," and under the foreclosure sale purchased the mortgaged premises. The decree was rendered May 19, 1898, and the sale was made June 30th, leaving a deficiency of $149.75. The decree, order of sale and sheriff's certificate of sale follow the mortgage in the description of the premises sold. On July 11th the motion was made to appoint a receiver "to take possession and charge of the crops that were growing on the land mortgaged and ordered to be sold by the judgment in said cause . . . . at the time of the foreclosure, for the purpose of subjecting them to the payment of the judgment." From the affidavits filed it appears that prior to the date of the judgment, May 19, 1898, the mortgagor was the owner of the undivided third of the crop on the land, which is all that is claimed by the appellant, and that this interest was sold by him, and possession delivered to S. G. Christie, who was party to the motion, on the 18th or 19th of May, 1898. Whether this sale was made before or after the decree of foreclosure does not appear. But it was made before the foreclosure sale. The case comes within the principles established in Simpson v. Ferguson, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484, and Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552, and on the authority of those cases the order should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

## HOWARD v. BRYAN et al.*

Sac. No. 684; September 29, 1900.

62 Pac. 459.

**Guardian and Ward.—Where a Petition to Mortgage Property** of minor heirs to raise a certain sum of money sets forth the items for which the money is wanted, such petition is not void on its face, though part of the items only are charges against the estate; hence a collateral attack on the validity of the petition on such ground, in a suit to foreclose the mortgage, is unavailing.

**Guardian and Ward—Mortgage.—Where an Order of Court Authorizing** a guardian to mortgage the property of minor heirs is susceptible of two constructions, one of which makes the interest of each minor liable only for his share of the entire debt, and the other makes the share of each liable for the whole debt, and the court can reasonably construe it to bind the interest of each for his share only, such construction will be given, and the order will be held valid.

**Guardian and Ward—Mortgage—Collateral Attack.—Under** Code of Civil Procedure, section 1578, as amended, declaring that a mere error or irregularity in mortgaging the property of minor heirs under order of court shall not invalidate the mortgage where the mortgage is attacked in a collateral proceeding, a mortgage given without delivery of a note to the mortgagee is valid, as failure to give a note is a mere irregularity.

APPEAL from Superior Court, Sacramento County; Matt F. Johnson, Judge.

Action by M. A. Howard against William Bryan and others. From a judgment for defendants the plaintiff appeals. Reversed.

Arthur E. Miller and Albert M. Johnson for appellant; White & Seymour for respondents.

GAROUTTE, J.—Mrs. Bryan, the guardian of the persons and estates of her five minor children, under an order of the court mortgaged their interest in certain real estate, amounting to an undivided five-twentieths, to secure a loan of $9,500. Mrs. Bryan individually and her five adult children also mortgaged their undivided interest in the same real estate, amounting to fifteen-twentieths thereof, to secure

*For subsequent opinion in bank, see 133 Cal. 257, 65 Pac. 462.

a repayment of the same money. The present action is brought to foreclose the mortgages. Plaintiff was nonsuited as to the cause of action based upon the mortgage given by the guardian of the minors, and judgment in his favor was rendered upon the mortgage given by Mrs. Bryan and her adult children. He now appeals from that portion of the judgment based upon the nonsuit.

The question here presented involves the validity of the mortgage given by the guardian under the order of the court. To support the claim of the invalidity of the mortgage, it is first insisted that the petition for permission to mortgage addressed to the court is void upon its face. By this petition the court is asked to order a loan of $10,000, and the various items going to make up this sum total are set forth in detail, as, for example, an item of $5,000 claimed to be due the guardian, as money expended by her in the care, support and maintenance of the minors, and which, it is alleged, is a charge against their estate. There is also an item of $2,500, which, it is alleged, is required to pay off a mortgage then resting on the property, which mortgage was given by the father of the minors during his life. It becomes unnecessary to enumerate the other items alleged in the petition going to make up the sum total of $10,000, although it may be said they include costs of the proceedings in guardianship and an estimated attorney's fee. Upon the hearing the court made an order allowing the guardian to negotiate a loan of $9,500. This attack by respondents upon the validity of the proceedings leading up to the mortgage is essentially a collateral attack, and for this reason those proceedings must appear to be void on their face or the attack can avail nothing.

What particular facts are essential to be set forth in a petition to allow a mortgage to be given, in order to give a court jurisdiction to make an order thereon, we will not here decide, for it is not necessary. Even if it be conceded that in the present case some of the items set forth in this petition, going to make up the sum total, were not a legal charge against the estate of the minors, yet, upon the other hand, there is no doubt but that some of these items were a proper charge against that estate, and this fact gave the court jurisdiction of the proceeding, and, upon proper notice given of the hearing, power to make the order it did make. For this reason the order here made is not void upon the ground of a

fatally defective petition, even conceding that a petition could be so deficient in its statement of facts as to deprive a court of jurisdictional power, after due and proper hearing, to make an order for a loan. If the court had the power to make the order to mortgage, then the amount of money which the guardian was allowed to borrow is not a material matter, and as to whether or not the guardian legally expends the money for the benefit of the minors is likewise a matter entirely immaterial here. That question will arise upon a settlement of the guardian's account.

It is next claimed that the order to mortgage is void because it purports to create a joint indebtedness of these five minors for the entire sum, and a single blanket mortgage is given to secure that indebtedness. We have no doubt but that the court was wanting in power to make an order for a mortgage which would bind the interest of each minor for the entire loan, and, if the necessary construction of this order was to bind each minor to that end, it could not stand. But a fair and reasonable construction of the order may be made, which will make it valid, and that construction we are bound to make. Each minor owned an undivided one-twentieth of the real estate, and it will be held in support of the validity of the order that each minor's interest in the estate is only bound as security for one-fifth of the amount of the debt, and upon the payment of that amount his interest will be released from the effect of the mortgage. As to the general legal principle here involved, see Neary v. Godfrey, 102 Cal. 338, 36 Pac. 655.

Section 1578 of the Code of Civil Procedure originally failed to provide for the giving of a promissory note by the guardian as evidence of the debt created under order of the court; but a short time before this loan was effected the statute was amended, whereby a guardian was authorized and directed to give the mortgagee a promissory note for the amount of the money loaned. Compliance was not had with this provision of the law in this case, and, while the failure to comply with the law may be said to have been a substantial departure therefrom, yet we do not deem the departure jurisdictional. The attack here made upon the mortgage being collateral, no mere error or irregularity in the proceeding, however important or substantial, will invalidate the mortgage. The section itself so declares, and we hold this

omission to be an irregularity only. No promissory note is necessary in order that there may be a valid mortgage, and a promissory note, if given under the circumstances here, would only be evidence of the indebtedness. For the foregoing reasons the judgment is reversed and the cause remanded.

We concur: Harrison, J.; Van Dyke, J.

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## DONNOLLY et al. v. KELLY et al.

S. F. No. 1559; October 6, 1900.

62 Pac. 513.

**Appeal.—Where There is Any Evidence of Negligence of defendant, a verdict for plaintiff will not be set aside for its insufficiency.**

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Catherine F. Donnolly and another against Daniel V. Kelly and another. From a judgment for plaintiffs and from an order refusing a new trial defendants appeal. Affirmed.

Walter H. Levy for appellants; Walter G. Holmes and W. G. Tuska for respondents.

PER CURIAM.—This is an action to recover damages for personal injuries. Plaintiff was in defendants' store, and while engaged in examining goods and wares fell down an open stairway leading to the basement and broke her leg. The only point made by defendants—and that is made in a most perfunctory way—is that the evidence does not show any negligence upon the part of the defendants in maintaining the open stairway as it was maintained. While the evidence upon the point is quite meager, yet we are not prepared to say that it is so meager as to demand that this court should set aside the verdict by reason of its insufficiency. For the foregoing reasons the judgment and order are affirmed.

## BLANCHARD v. HARTWELL, Treasurer.

L. A. No. 1018; October 17, 1900.

62 Pac. 509.

**Municipal Corporations — Freehold Charters—Amendment.**—Constitution, article 11, section 8, providing that a freeholders' charter of a city may be changed by amendment submitted by the legislative authority of the city to be voted on at an election held for such purpose, constitutes the only method by which such a charter can be amended.

APPEAL from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by one Blanchard against one Hartwell, treasurer. From a judgment in favor of defendant plaintiff appeals. Reversed.

M. L. Graff for appellant; R. H. F. Variel for respondent.

PER CURIAM.—The court being of the opinion that a freeholders' charter can be changed only by amendments submitted by the legislative authority of the city, as provided in section 8 of article 11 of the constitution, the judgment appealed from is reversed. A fuller statement of the grounds of this decision will be filed hereafter.

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## MEYERINK v. BARTON.

S. F. No. 1671; October 24, 1900.

62 Pac. 505.

**Appeal—Verdict on Conflicting Evidence.**—Where the jury found for plaintiff, on conflicting evidence, and much of the evidence raising the conflict was in the shape of ex parte affidavits and depositions, made by citizens of a foreign country, the rule that a verdict on conflicting evidence will not be disturbed on appeal controls.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by J. O. Meyerink against Benjamin F. Barton. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. C. Judkins and H. N. Clement for appellant; Chas. F. Hanlon for respondent.

CHIPMAN, C.—Action for breach of warranty of quality of certain salt sold by defendant to plaintiff. The cause was tried by a jury, and plaintiff had the verdict. The appeal was taken within sixty days from the rendition of judgment, and a reversal is asked upon the ground that the judgment is not supported by the evidence: Code Civ. Proc., sec. 939, subd. 1. The transcript contains a statement on motion for new trial, which motion had not been heard when this appeal was taken.

No alleged errors of law committed at the trial are presented on this appeal. The sole and only question argued is, Is there sufficient evidence to support the verdict? Defendant is a manufacturer of salt, whose works are near Alviso, Alameda county. He has a place of business in San Francisco. Plaintiff is a commission merchant of San Francisco. In November, 1894, plaintiff purchased from defendant twenty-five tons of "half-ground" salt, according to sample furnished, to be shipped to one Guillermo Garcia Salas, a merchant of Retalhulen, Guatemala, by steamer "San Blas," the port of destination being Champerico. The salt reached its destination on November 27, 1894, and was satisfactory to the consignee. He shortly after telegraphed plaintiff to duplicate this shipment, and plaintiff gave the order to defendant about December 1st, pursuant to which defendant, on December 6, 1894, shipped the salt on the steamer "San Juan," which sailed on December 7, 1894, to the same consignee and to same port of destination. The controversy arises out of this last shipment, plaintiff claiming that the salt was not according to sample, but much inferior, whereby he suffered loss as alleged.

Defendant's counsel say in their brief: "We are fully aware of the general rule that, in an appeal from a judgment, the verdict will not be disturbed, even though not supported by a preponderance of evidence, if there is a substantial conflict in the evidence." While not admitting a

substantial conflict, they "invoke a modification of the rule in this case from the fact that the only semblance of testimony which could be regarded as raising a conflict comes to us under very suspicious circumstances, and is in the form of loosely drawn ex parte affidavits and depositions, made by natives of a foreign country, viz., Guatemala, and taken in Guatemala." We are cited to Wilson v. Cross, 33 Cal. 60, and to Reay v. Butler, 95 Cal. 206, 30 Pac. 208, in support of the claim that in such cases "this court has held that the rule does not retain its full force."

The court in Reay v. Butler, supra, in reviewing the earlier cases, took occasion to say that while the court will look into the evidence a little more closely when it consists entirely of depositions or affidavits, or notes of former testimony, "it cannot be taken as settled that in such a case the rule as to conflicting evidence does not apply." In the present case there was testimony material to the issues other than by deposition. Besides, it cannot for a moment be allowed that depositions made in foreign civilized countries by citizens of those countries are to be looked upon with suspicion or given less weight by reason alone of the residence or nativity of the witnesses. Such testimony must be judged as other testimony is judged.

The circumstances and facts surrounding the witnesses and the taking of the depositions in question, pointed out by appellant as tending to show the improbability of the truth of some of the facts sworn to by plaintiff's foreign witnesses, were all before the jury. The alleged contradictory statements of witnesses; the explanations given by them of the fact that their sworn statements in the depositions differed in some respects from previous statements in ex parte affidavits—were all matters which the jury were called upon to reconcile, and are wholly beyond the province of this court to review.

The conflict in the testimony submitted in support of the contention of the respective parties is irreconcilable. For example: Plaintiff testified unequivocally at the trial that he did not see a sample or any of the last shipment of salt that was shipped by his order, and so also did his bookkeeper, Bein, while defendant's evidence was to the effect that both plaintiff and Bein saw some of the salt that was being sacked to fill the order, and expressed satisfaction with it. Again,

defendant's evidence would have justified the jury in finding that he shipped salt not only up to sample, but even better than that first sent. On the other hand, the evidence of plaintiff would warrant the conclusion that the salt shipped by defendant which arrived at Champerico, and was delivered to Salas, the consignee, was not only not up to the sample, but was of a different and inferior grade. It is impossible for this court, under its well-established rule, to enter upon the attempt to reconcile the conflict so obviously present in this case.

Under the instructions of the court, the jury rendered a verdict for $451.91 as the damages sustained by plaintiff, which was much less than claimed. We do not understand defendant to question the method of computation of the damages made by the jury or the amount found by them; the objection to the verdict is that the jury found a breach of warranty, whereas defendant claims that the evidence shows no such or any breach. Other questions may arise on the motion for a new trial, as to which we, of course, express no opinion. There was, we think, evidence sufficient to support the verdict, and the judgment should be affirmed.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## SCHWEIKERT v. SEAVEY.

S. F. No. 1636; October 30, 1900.

62 Pac. 600.

**Appeal—Conflicting Evidence.—Where the Trial Court Finds** for defendant on conflicting evidence, such finding will not be disturbed on appeal, though the evidence would have justified a verdict for plaintiff.

**Lease—Extension.—Plaintiff Leased Land to Defendant** for a certain period, before the expiration of which plaintiff told defendant that he could have the land for another like period, the defendant agreeing to cut plaintiff's crops as a part consideration for the extension; and subsequently plaintiff said that he would not go back

on his word, and that, as the ground was low, and not in shape for planting, defendant "could summer-fallow it." Part only of the land was summer-fallowed by defendant before the expiration of the original lease. Held, that the summer-fallowing of the ground was not a condition precedent to the extension of the lease, since it was a mere suggestion by plaintiff, and a matter of no concern to him, since he was not to be paid a crop rental.[1]

**Lease—Rescission or Repudiation.—Civil Code, Section 1689,** provides that contracts may be rescinded only in cases where the consent of the party rescinding is obtained by fraud, duress or undue influence; or failure of consideration through fault of party as to whom the contract is rescinded; or on such consideration becoming entirely void from any cause; or if the consideration, before it is rendered, fails in a material respect; or by consent of all the parties. Section 1691 declares that the rescinding party must restore or offer to restore the value he has received under the contract. Plaintiff leased certain land to defendant for a certain period, before the expiration of which he told defendant he might have it for another like period, and subsequently acknowledged to plaintiff that he told him he might have the land, but that his word was worthless, and that he could not have it. Held, that this did not amount to a rescission of the contract, but was a mere repudiation.

**Unlawful Detainer.—Where, in an Action for Unlawful detainer** of land, defendant answers that he holds over under an oral agreement by which he was to do certain work as part consideration for extension of the lease, the value of which was to be applied to the second year's rental, there is no prejudicial error in overruling an objection to the question, "Have you been paid for this work?" asked of defendant by his counsel, though it is not within any issue.

**Unlawful Detainer.—In an Action for Unlawful Detainer of Land,** defendant answered that he held over under an oral agreement entered into before the expiration of the original period, by the terms of which he was to hold for another like period; and he was asked whether he held the premises at that time under the original lease or the subsequent agreement. Held, that, though the question asked for a conclusion rather than a fact, error in admitting it was harmless, since it was evident that defendant claimed to hold under the verbal agreement.

**Unlawful Detainer.—Where Plaintiff in an Action for Unlawful** detainer alleges that the term for which the lands were demised had expired, which allegation is denied, but the real issue is whether the lease had not been extended, in the absence of a showing or a plain inference that a failure to find on the allegation of the termination of the lease was injurious, such action will not be reversed on appeal.

**Unlawful Detainer.—Where Defendant in an Action for Unlawful** detainer answers that he held over under an oral agreement by

[1] **Cited in the note** in 120 Am. St. Rep. 59, on unlawful detainer.

which he was to do certain work for plaintiff as a part consideration for the renewal of the lease, which work he had performed, and which was of a certain value, failure to find the value of the work is not error, since the action was not for an adjustment of mutual accounts, and hence the value of the work was immaterial.

APPEAL from Superior Court, Lake County; R. W. Crump, Judge.

Action by Albert Schweikert against F. H. Seavey. From a judgment in favor of the defendant and from an order denying a new trial plaintiff appeals. Affirmed.

M. S. Sayre for appellant; Dan Jones and T. J. Sheridan for respondent.

CHIPMAN, C.—Action to recover possession of real property demised by plaintiff to defendant, the lease having expired, and defendant continuing in possession. The cause was tried by the court without a jury, and judgment given in favor of defendant, from which, and from the order denying his motion for a new trial, plaintiff appeals.

The complaint sets forth a written lease for one year from November 5, 1896, at a certain cash rental; that on November 6, 1897, plaintiff made demand in writing for possession; that more than three days have elapsed since making demand, and defendant has refused and neglected to quit possession. The complaint was filed November 24, 1897, and states the action of unlawful detainer, under section 1161 of the Code of Civil Procedure. The answer alleges that about March 15, 1897, plaintiff and defendant entered into an agreement by the terms of which plaintiff leased the premises to defendant for an additional year, to begin at the expiration of the term for which defendant then held the premises, and on the same terms; and that plaintiff further agreed at the same time to employ defendant to do certain described farm work for him, and apply the compensation therefor on the rental for said additional year. The cause was tried on February 28, 1898, and the court found the written lease as alleged in the complaint; that defendant went into possession thereunder, and is now in possession under the verbal lease as alleged in the answer; and as conclusion of law the court found that defendant was entitled to judgment for his costs, and that

plaintiff take nothing by his action. The principal fact at issue was the alleged verbal lease found by the court to have been entered into between the parties. It is urged that the evidence does not support the finding. The evidence is sharply conflicting, and we can only inquire whether there was evidence sufficient to support the finding. Defendant testified that, owing to the continued wet weather, and the consequent improbability of his being able to put a crop in the land for the year 1896–97, he had a conversation with plaintiff in January, 1897, at which time plaintiff told defendant that he could have the land another year; "that he would continue the present lease, and he would give me his work in cutting his own crop on the home place to help pay the rent. I accepted that proposition. . . . . In consequence of that conversation, I made further efforts to put in more land. I put in some, but that is wet land, and in order to dry it I ran ditches through it to run the water off so I could summer-fallow it." Again, he testified that in February or first of March "we had another conversation [in the presence of two persons, whom he named]. . . . . It was just beginning to rain, and we spoke about the weather; that it was hard to get a crop in on that piece of ground, and that it was late; it was low, wet ground, and he said I could summer-fallow the ground, and that he would not go back on his word; that I could have the place another year, and that he would give me all the work he had to pay the rent. I told him I would take the place." Defendant testified further that in March following he looked over plaintiff's hay ground, and a price for the work was agreed on, and plaintiff asked defendant "if it would go on the rent, as we had agreed," to which defendant replied, "I told him 'Yes.'" Again, in July defendant met plaintiff, and the latter "began finding fault with the way the work was done. I asked him if he didn't say it was satisfactory at the time it was done. He said that he did, but that he had found fault with it. I said, 'Didn't you agree to let me have it?' He said 'Yes.' I said, 'Ain't your word worth anything?' He said, 'No, it's not worth a damn, and you can't have it.' That was all the conversation at that time." There is considerable testimony corroborative of plaintiff's having agreed to extend the lease one year. It is true that the testimony of plaintiff and that of his wife is directly the other way, and would perhaps have justified

the court in finding for plaintiff. But the court evidently accepted the testimony of defendant's witnesses, and with this exercise of power by the court we cannot interfere.

Appellant contends that at most the contract was conditional; i. e., that it was a condition precedent that defendant was to summer-fallow the land if he could not plant it. As it turned out, he succeeded in cultivating seventy acres, but did not summer-fallow the remaining twenty acres for the first year of the lease. We do not think the evidence will bear the construction claimed by appellant. There is certainly no direct evidence, nor is there any intention plainly expressed, tending to show that the matter of summer-fallowing the land was to be a condition upon which the extension of the lease was to depend. The rule is that stipulations in a contract are not to be construed as conditions precedent, unless the construction is made necessary by the terms of the contract: Deacon v. Blodgett, 111 Cal. 416, 44 Pac. 159. In the present case the matter of summer-fallow was a suggestion rather than a stipulation, and was a matter of no concern to plaintiff, for he was not to be paid a crop rental.

Appellant also contends that he rescinded the contract in July, 1897. The evidence may tend to show that plaintiff attempted to repudiate, but not to rescind, the contract, for the evidence fails to disclose such a situation as would have entitled him to rescind (Civ. Code, sec. 1689); and plaintiff neither restored nor offered to restore to defendant the value he had received from defendant under the contract (Civ. Code, sec. 1691).

Error is claimed in overruling plaintiff's objection to the following question put to defendant as a witness by his counsel: "Have you been paid for this work you did for Mr. Schweikert?" This was the work he had agreed to do as part consideration for extending the lease, and the value of which was to be applied to the rental for the second year. We see no prejudicial error in the question, even if it be admitted as not within any issue. When defendant was testifying as a witness in his own behalf, he was asked by his counsel whether he held the premises at that time under the lease of November 5, 1896, or the agreement made in January and March, 1897. The question was objected to as calling for an opinion, and as immaterial. The question tended to invade the prerogative of the court, and asked for a con-

clusion, rather than a fact. At the same time we cannot see how harm could have come from the answer. It was plain enough from the evidence that defendant was claiming to hold under the verbal agreement, without his having been asked to so testify. The question was unnecessary, and open to objection, but the error was harmless.

Plaintiff had alleged in his complaint "that the term for which said premises were demised as aforesaid has terminated," and it is now urged that the court erred in not finding on this allegation, which was denied in the answer. No question was involved as to the termination of the written lease. By its terms it expired November 5, 1898. The real question at issue was not whether the written lease had expired, but whether it had been renewed. If the court had found that the written lease had expired, it would not have changed the result. Injury must be shown, or must be plainly inferable, before there can be a reversal.

It is urged as error that the court failed to find as to defendant's allegation in the answer that he had performed work for plaintiff of a certain value. The court found that defendant performed work for plaintiff for which he was to be paid a reasonable sum, and that "said sum so earned by the defendant for so doing said work it was then agreed should apply pro tanto on the rent to be paid plaintiff by defendant . . . . for the said additional term then agreed upon." It was not necessary to find as to the value of this work. The action does not purport to be for an adjustment of mutual accounts. This feature of the case was introduced as part of the contract under which defendant claimed the right to hold over, and it was immaterial what was the precise amount agreed to be paid for the work defendant agreed to do for plaintiff. A finding of the amount or omitting to find it could not have affected the result in any way. The judgment and order should be affirmed.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## FRANTZ et al. v. HARPER.

S. F. No. 2103; October 30, 1900.

62 Pac. 603.

**Judgment—Pleadings.—Where Action is Brought Under Contract** to pay certain tolls, and the answer does not deny the contract, but alleges that such tolls are illegal, and the plaintiff offers evidence in support of the complaint, and no evidence is introduced by the defendant, the plaintiff is entitled to judgment on the admissions in the answer.[1]

**Trial—Burden of Proof.—Where an Action is Brought** on a contract to pay certain tolls, and the answer does not deny the contract, but alleges that such tolls are illegal, the burden of establishing the illegality thereof is on the defendant.

**Trial—Finding.—Where an Affirmative Defense is Pleaded** in an action, and the defendant fails to introduce any evidence, he cannot complain, on appeal, that the court did not make a finding on such defense.

APPEAL from Superior Court, Del Norte County; F. A. Cutler, Judge.

Action by F. Frantz and another, as executors of the estate of H. Gasquet, against J. C. Harper. From a judgment in favor of the plaintiffs the defendant appeals. Affirmed.

L. F. Cooper and Frank McGowan for appellant; S. M. Buck for respondents.

COOPER, C.—This action was originally brought in a justice court. The complaint alleged "that the said defendant is indebted to said estate in the sum of $568.75 for toll, rent of stable, and blacksmith-shop, and boarding men from July 1, 1898, to January 1, 1899, at the agreed price of $87.50 per month; that no part of said sum has been paid, except the sum of $368.25, leaving a balance due and owing from the said defendant to the said plaintiff of $200.50, no part of

[1] Cited and followed in Woodham v. Cline, 130 Cal. 500, 62 Pac. 823, an action against a sheriff for an alleged illegal seizure. There the court said: "A party cannot be heard to complain of the absence of a finding upon a material issue, if the finding must have been against him upon the record as presented."

which sum has been paid." The answer and cross-complaint were intended by the pleader to raise the question of the legality of that part of the amount claimed in the complaint which is for tolls due plaintiffs. It will be presumed (although the record is silent as to the matter) that the justice certified the case to the superior court upon the ground that it involved the legality of a toll. The case was tried before the court, findings filed, and judgment entered for plaintiffs for the amount claimed in the complaint. Defendant appeals from the judgment and from an order denying his motion for a new trial.

It is said in appellant's brief: "The principal contention made for a reversal of the judgment is that the finding that the toll, mentioned in the contract as set forth in plaintiff's complaint, was and is a legal toll, is not supported by the evidence." We do not see, from the evidence, how the court could have made any different finding. Conceding that the facts set forth in defendant's answer were sufficient to show the portion of plaintiffs' demand for tolls to be illegal, the burden was upon defendant to prove the affirmative matter thus set up in his answer: Wilson v. Railroad Co., 94 Cal. 172, 17 L. R. A. 685, 29 Pac. 861. Plaintiffs were entitled to judgment on the admissions of the answer, unless the defendant introduced evidence in support of his affirmative defense. Plaintiffs alleged an express contract for toll, rent and board, and the defendant did not deny the contract.

The evidence supports the allegations of the complaint, and the court finds such allegations to be true. The finding as to the truth of the allegations of the complaint is not challenged. Defendant offered no evidence, and hence is not in a position to claim that the court did not find on the affirmative matters alleged in the answer. A party cannot claim error in the failure of the court to find upon an issue if the finding must have been against him: People v. Centre, 66 Cal. 564, 5 Pac. 263, 6 Pac. 481; Demartin v. Demartin, 85 Cal. 75, 24 Pac. 594. We advise that the judgment and order be affirmed.

We concur: Chipman, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

# Ex Parte FEDDERWITZ.

## Cr. No. 636; November 26, 1900.

62 Pac. 935.

**Justices of Peace.—Code of Civil Procedure, Section 103,** as amended by Statutes of 1899, page 88, provides that in every city or town of the fourth class there shall be one justice of the peace. Statutes of 1883, page 24, as amended by Statutes of 1899, page 141, provides that all municipal corporations having a population of 10,000 and not exceeding 15,000 constitute the fourth class, and that there may be a special enumeration to determine the population of a city, which when made shall be deemed the number of inhabitants of such city for the purpose of legislation affecting municipalities. Statutes of 1895, page 409, in the preamble to a resolution ratifying the freeholders' charter of a town, recited that such town had a population of more than 10,000. Held, that the office of justice of the peace for such town had a legal existence, and could be legally filled.[1]

**Municipal Corporation—Freeholders' Charter.—Where the Legislature,** in the preamble to a resolution ratifying a freeholders' charter for a city, recited that such city contained a population of more than 10,000, such resolution, with the charter it establishes, being a law of the state, is conclusive as to the fact recited in the preamble.

**Justice of Peace—Attack upon in Habeas Corpus.**—Where the office of justice of the peace in a city has a legal existence, the title of the incumbent cannot be attacked in habeas corpus proceedings by a party convicted before such justice of violation of a municipal ordinance.[2]

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[1] Cited in Williams v. Board of Trustees, 157 Cal. 719, 109 Pac. 486, in respect of the words of the chief justice: "A city of the fourth class, organized under the charter of that class, retains its charter notwithstanding an increase of population which put it in the third class."

Cited in Puterbaugh v. Wadham, 162 Cal. 617, 123 Pac. 807, a case involving the payment of salary to a justice of the peace.

Cited and followed in Puterbaugh v. Wadham, 162 Cal. 617, 123 Pac. 806, where the court held that, for the purpose of determining the amount of salary to be paid a justice of the peace of the city of San Diego, that city was to be regarded as having passed, without formal action of any sort, into the second class of municipalities under the code.

[2] Cited and followed in Ex parte Simmons (Nev.), 125 Pac. 698, where it was held that if the person presiding at the trial of the

**Intoxicating Liquors.—A City Ordinance Providing That It** shall be a misdemeanor for any person to sell or give away any spirituous liquors within the city, except a licensed druggist selling on the prescription of a regularly licensed physician, which does not conflict with any general law of the state, is valid, though it prohibits a single act of selling or giving away malt and spirituous liquors by one not engaged in the liquor traffic.

**Intoxicating Liquors.—Where a City Ordinance Provides** that it shall be a misdemeanor for any person to sell or give away any malt or spirituous liquors within the city except a licensed druggist selling on the prescription of a regularly licensed physician, a complaint charging a violation of such ordinance need not allege that defendant was not a licensed druggist, since that is a matter of defense.

Application for a writ of habeas corpus by George Fedderwitz against Oscar L. Rogers and another. Petition denied.

Chapman & Clift and A. L. Frick for petitioner; Brewton A. Hayne and Fox & Gray for respondents.

BEATTY, C. J.—The petitioner was convicted before Robert Edgar, claiming to be justice of the peace of the town of Berkeley, of violating an ordinance of that municipality. On appeal to the superior court the judgment of the justice's court was affirmed, and in pursuance thereof petitioner is held in custody of the sheriff of Alameda county. He claims that his imprisonment was unlawful: First, because there is no justice's court of the town of Berkeley; second, because the ordinance defining the offense of which he was convicted is void; and, third, because the complaint upon which he was prosecuted does not charge the offense defined in the ordinance.

It is assumed by counsel for petitioner that the question to be determined in this proceeding under his first point is

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petitioners "was the justice de facto for the time being of," etc., "the judgment against petitioners was valid, and the authority of such de facto justice is not open to collateral attack upon a proceeding in habeas corpus."

Cited and followed in Re Bond, 12 Cal. App. 258, 107 Pac. 145, on the point that one sale may be a violation of a prohibitory liquor ordinance which says, among other things: "Any person, firm, corporation, club or association . . . . that sells, keeps for sale, offers for sale, furnishes, distributes, divides, delivers, or gives away any spirituous, vinous, malt or mixed liquors," etc.

in all respects the same as the question decided in Miner v. Justice's Court, 121 Cal. 264, 53 Pac. 795, and that it must be decided the same way, unless some legislation subsequent to the decision of that case can be found which leads to a different result. But in this assumption I think counsel are mistaken. The questions are not the same. In the former case the proceeding was by mandamus to compel the issuance of an execution upon a judgment rendered by the justice's court—consisting of two justices of the peace—which the legislature had attempted to create by the special and local act of March 27, 1895 (Stats. 1895, p. 205). It was claimed on the part of petitioner in that case that there was such a justice's court for the town of Berkeley created by that act, or, if not, that the court of similar title created by the original act of incorporation (Stats. 1877–78, p. 888) continued in existence notwithstanding the adoption of the freeholders' charter of March 25, 1895. Both points were ruled the other way, the court holding that the old court was abolished by the adoption of the freeholders' charter, and that the act attempting to create a new court was invalid because local and special; and, having thus disposed of the only questions presented by counsel for its consideration, the court denied the writ of mandate without considering the question presented by this case, viz., whether there is or can be a justice of the peace for the town of Berkeley. If, by legal possibility, there may be a justice of the peace lawfully exercising the powers of that office for the town of Berkeley, the right of Robert Edgar to act in that capacity cannot be drawn in question in this proceeding. If there can be a de jure officer, the right of the de facto officer cannot be collaterally assailed.

That the office of justice of the peace for the town of Berkeley has a legal existence is, I think, very clear. In the first place, it has been the law ever since 1880 that there shall be one justice of the peace in every city having 10,000 and not more than 20,000 inhabitants: Code Civ. Proc., sec. 103. This is part of a general law of the state (Code Civ. Proc., sec. 85 et seq.), the constitutionality of which has been frequently affirmed: Bishop v. City of Oakland, 58 Cal. 572; People v. Ransom, 58 Cal. 558; Coggins v. City of Sacramento, 59 Cal. 599. It will not be contended, I suppose, that Berkeley is not a "city," within the meaning of this act, because it has styled itself in its charter the "town" of

Berkeley; and, if it is a city, it became entitled to a justice of the peace as soon as the fact was legally established that it had over 10,000 inhabitants, and this fact was legally established in the most solemn and conclusive manner by the preamble to the joint resolution of the legislature of March 5, 1895 (Stats. 1895, p. 409), approving the freeholders' charter. At the date of that resolution it was necessary that a city should have a population of at least 3,500 before it could frame a freeholders' charter (Const., art. 11, sec. 8, as amended in 1892), and it was the undoubted right and duty of the legislature to ascertain the population of Berkeley before acting upon the proposed charter. This the legislature did, and in the preamble to the resolution ratifying the charter it recited and proclaimed the fact that the town of Berkeley contained a population of more than 10,000 inhabitants. This resolution with the charter which it establishes is a law of the state, and is conclusive as to the fact so recited in the preamble. If, therefore, the law assigning one justice of the peace to every city with a population of more than 10,000 and not exceeding 20,000 had remained unchanged, I should have no hesitation in holding, upon this ground alone, that the office of justice of the peace for the town of Berkeley has existed ever since the 27th of March, 1895; and, although this conclusion might appear to be at variance with the conclusion reached in Miner v. Justice's Court, it is not inconsistent with anything actually considered or decided in that case. There the whole contention of counsel was in regard to the validity of the special act of 1895 creating a court consisting of two justices of the peace. It was assumed throughout the argument that, if the act of 1895 was invalid, there was no justice's court in Berkeley, unless it could be held that the provisions of the old charter of 1878, establishing a justice's court, remained in force notwithstanding the freeholders' charter of 1895. The argument of counsel being directed exclusively to these propositions, they alone were considered in deciding the case. If our attention had been called to the provisions of section 85 et seq. of the Code of Civil Procedure, and the population of the city as declared in the resolution of the legislature approving the freeholders' charter, we could not have held that the office of justice of the peace of the town of Berkeley did not exist at that time. And in fact we did not so hold. All we decided was that

the court—consisting of two justices, of which alone Gentry claimed to be a member—had no legal existence. But since the decision of that case there has been new legislation, or attempted legislation, affecting the office of justice of the peace in cities and towns. On March 10, 1899, an act was passed to amend section 103 of the Code of Civil Procedure: Stats. 1899, p. 88. Before amendment it was provided in that section that in cities having a population of more than 20,000 and not exceeding 100,000 there should be two justices of the peace, and in cities having a population of more than 10,000 and not more than 20,000 there should be one justice of the peace. By the amendment this classification was discarded, and in place thereof it was provided that in every city or town of the third or fourth class there should be one justice of the peace, and in every city or town of the second class there should be two. Some question is made as to what is meant in this amendment by cities of the second, third and fourth classes, but to this question there can be but one answer. The only classes of cities known to our laws are those defined in the act of March 2, 1883 (Stats. 1883, p. 24), entitled "An act to provide for the classification of municipal corporations," by which all such corporations in the state were divided into six classes according to population, those having a population of more than 10,000 and not exceeding 15,000 constituting the fourth class. This undoubtedly is the classification to which the amended section refers. But, if this must be conceded, the petitioner contends that the object of this act was to classify cities and towns solely for the purpose of incorporation and organization under the general municipal incorporation act, which the new constitution enjoined, which was then under consideration, and which was subsequently passed at the same session of the legislature: Stats. 1883, p. 93. To this it may be answered that the title of the act does not indicate any such limited purpose, and the language of the first section is broad enough to embrace every purpose (including the assignment of justices of the peace) for which a classification by population might be expedient or permissible. In succeeding sections of the act, however, are contained provisions which indicate very plainly that the main, if not the only, purpose of that particular classification at that time was to establish a basis for the organization and reorganization of cities and towns under the

general incorporation act. That it was not intended to serve as a basis for the appointment of justices of the peace is further shown by the fact that a classification already established for that purpose (Code Civ. Proc., sec. 85 et seq.) was left undisturbed. But, conceding all this, the conclusion which the petitioner would draw from the original purpose of the act does not follow. His contention appears to be that section 103 of the Code of Civil Procedure is meaningless and void, because its provisions are based upon a classification originally adopted for the purposes of legislation upon another subject—a proposition to which we cannot accede. There is no reason why a classification of cities and towns by population originally adopted by one legislature for a particular purpose may not be referred to or made use of by a succeeding legislature for other purposes of legislation to which a similar classification is essential, and for which it will conveniently serve; and there would be neither reason nor excuse for holding the amended section 103 of the Code of Civil Procedure meaningless and void merely because it has made an act passed for one purpose serve another purpose equally legitimate. For it is to be remembered that there is here no question of the power of the legislature or validity of the law. It is a mere question of construction that we have to deal with, and, if there is a discoverable meaning in the statute, we have nothing to do but to declare and enforce it. That it has a meaning, and a very plain meaning, I cannot doubt.

But it is contended that, if this amendatory act refers to the classification of the act of 1883, it embraces only such cities and towns as have been incorporated under the general incorporation act; the proposition being that, unless a city or town has been so incorporated, it does not belong to any of the classes defined in the act of 1883, and especially if it has been incorporated under a freeholders' charter, as Berkeley has been, it does not belong in any class. So far as this argument depends for its support upon a construction of the amendatory act itself, it is refuted by the plain terms of the second section, which expressly provides that it shall not apply to cities incorporated under the general incorporation act; and, since they are made the only exception, the law must embrace all cities and towns with special charters. If, on the other hand, petitioner's contention depends upon the

proposition that the classification act of 1883 applies only to cities and towns organized under the general incorporation act, the argument is equally unsupported. When that act was passed, there was no general law in existence for the incorporation of cities and towns, and, as a necessary consequence, there were no such cities and towns to be classified. Considered by itself, and without reference to prospective legislation, if it classified any municipal corporations it must have classified those cities and towns theretofore organized under special charters antedating the new constitution. Considered with reference to contemplated legislation—that is to say, with reference to the bill then before the legislature, and subsequently passed, providing for the incorporation of cities and towns under the general law—it follows with equal certainty that the law embraced all existing corporations; for upon this view, and upon this view alone, can the two acts be harmonized. By the general incorporation act (Stats. 1883, p. 93) provision was made in the first three sections for the incorporation of the inhabitants of unincorporated territory of the respective counties, and then, by section 4, provision was made for the reincorporation under that act, and in their proper classes, of cities and counties, cities and towns, which had been previously incorporated under special charters. This would seem to prove conclusively, if any proof were needed outside of its title and its express terms, that the classification act of 1883 was intended to embrace all incorporated cities and towns then existing; and there is, to my apprehension, no reason for holding that it was not also intended to stand as a part of the permanent legislation of the state, and to have its legitimate operation, according to its terms, upon all cities and towns thereafter incorporated, whether under the general act then in preparation, or under freeholders' charters, as provided in the constitution. But, whether such was the original intention or not, there can be no doubt, in view of the second section of the act amending section 103 of the Code of Civil Procedure, that the legislature of 1899 understood that the act of 1883 embraced all cities having special charters, and that they intended its classification to serve in such cities, and in such cities alone, as the basis for the apportionment of justices of the peace. This view is, I think, sufficiently supported by the considerations above suggested, but it is made more evident by a significant

amendment to the classification act of 1883, contained in the act of March 20, 1899 (Stats. 1899, p. 141). It was provided in the original act that the decennial census of the United States should determine the population of the respective cities and towns, unless there should be a special enumeration of their inhabitants made under certain prescribed conditions. The legislature, recognizing that such special enumeration was originally authorized for the sole purpose of enabling a city or town to reorganize, if it so desired, under the charter of the higher or lower class to which it had risen or been reduced by gain or loss of population, and evidently anticipating the argument of the petitioner in this case, deliberately amended the act by inserting an express declaration that the special enumeration, when made, should serve the purposes of all legislation affecting municipalities. The original act, before amendment, provided fully and explicitly for the enumeration, and for the proceedings to be taken in order to effect a reorganization in a new class. Everything necessary for this purpose was fully and elaborately provided, and no amendment of the law was called for unless its scope was to be enlarged. This being so, the terms of the amendment seem peculiarly significant. It reads as follows: "Whenever the result of such enumeration sh: "have been declared by the council, board of trustees, or other governing body, and entered in the minutes of such body, thereupon the number of such inhabitants so ascertained shall be deemed the number of inhabitants of such city for all the purposes of this act, and for the purposes of legislation affecting municipalities." To say that the amended act means nothing more than it meant originally is to violate fundamental principles of construction. Clearly, the amendment was intended to accomplish something, and that was to enable the inhabitants to secure to themselves the benefits of any general legislation applicable to cities and towns according to population without waiting ten years for the United States to take a census. If this were doubtful upon the terms of the statute, the doubt would be removed by the fact that the amendment was made by the same legislature, at the same time, and evidently as a part of the same scheme, as the amendment to section 103 of the Code of Civil Procedure. At the same time that they changed the law so as to apportion justices of the peace according to the general classification of the act of 1883, they

enlarged the scope of the enumeration provided for in that law so that it might serve to determine the proper number of justices in each city and town. From all of which considerations it clearly results that, if the town of Berkeley is a city of the fourth class, the office of the justice of the peace exists there by force of the amendment to section 103 of the Code of Civil Procedure, if that amendment is constitutional.

But it is still further contended that Berkeley is not a city of the fourth class in any sense attributable to the statute. I have already considered the objection that because it is organized under a freeholders' charter, or, rather, because it is not organized under the general incorporation act, it belongs to no class created by the act of 1883; and I think it has been demonstrated that even under the original act it falls into its proper class by virtue alone of the number of its inhabitants, and certainly that it is comprehended in the classification of the amended law.

The other objection under this head is that the mere ascertainment of the fact that Berkeley has risen to a population exceeding 10,000 does not put it into the fourth class. This contention is based upon section 3 of the classification act and the point supposed to have been decided in Re Mitchell, 120 Cal. 384, 52 Pac. 799. The whole contention, however, is based upon a confusion of terms, and is unaffected by anything decided or involved in Re Mitchell. The question discussed in that case in both the principal and concurring opinions was whether the police court of Los Angeles had ceased to exist the moment it was ascertained by a special enumeration that the population of the city exceeded 100,000, and all that was decided was that changes of municipal organization do not take place automatically in consequence of changes of population which remove cities from one class to another. This is quite in consonance with the provisions of the classification act. A city of the fourth class, organized under the charter of that class, retains its charter notwithstanding an increase of population which puts it in the third class. But it does not follow that because its charter remains unchanged its class remains unchanged. On the contrary, the privilege of changing its charter depends upon a change of class. The charter has nothing to do with fixing its class. That is dependent upon population alone, which is an element of all cities, however organized. In organizing under the

general law a city must accept the charter of its proper class; but, unless it elects otherwise, it retains its original charter, no matter to what class it may rise or fall by change of population. This is the whole effect of the decision in Re Mitchell, and it does not conflict with the proposition that Berkeley, like every other city of California, becomes at once, within the meaning of our statute law, a city of the class to which its legally ascertained population assigns it. As to the remark in Justice Henshaw's concurring opinion that legislation mediate or immediate is necessary to change the municipal organization, that view is satisfied by any formal, legal and appropriate action of the local authorities following upon an ascertained change of population. With respect to the election or appointment of a justice of the peace in a city whose population has come to exceed 10,000, an election duly called by the proper authority, or an appointment duly made, should be deemed sufficient. By such action no inconvenience could accrue, and great inconvenience might, in many cases, be avoided. As to Berkeley it has been pointed out that its population was ascertained and proclaimed by the legislature in 1895. This alone would determine its status as a city of the fourth class. But there has also been made a special enumeration of its inhabitants conforming to all the requirements of the amended act of 1899, above quoted, which also establishes the fact that it is a city of the fourth class for all purposes of legislation. Subsequent to this enumeration, Edgar was duly appointed to the office of justice of the peace.

Passing now from these questions of construction, which have been more fully considered, perhaps, than necessary, we come to the last contention of petitioner on this head, viz., that the act amending section 103 of the Code of Civil Procedure is unconstitutional, because it is a special law in a case where a general law could be made applicable. It is said, in the first place, that the law is special because it makes no provision for cities of the first class or for cities below the fourth class. But this objection overlooks the fact that provision is made for cities in the unamended sections of the same chapter of the code (sec. 85 et seq., Code Civ. Proc.), and that it has never been deemed an objection to the validity of that law that no provision was made for justices of the peace in cities and towns of less than 10,000 inhabitants. For

them the township justices are deemed sufficient. It is next said that the law is special, because cities organized under the general law are excluded from its operation. This is, to my mind, a much more serious objection to the validity of the law, and, speaking for myself, I should be inclined to hold that, unless the exception of that class of cities can be disregarded, the amendment is void. But this question does not require a decision in this case. Concede, for the present, that the amendment is void, and that the town of Berkeley is not entitled to a justice of the peace as a city of the fourth class, the simple result is that section 103 of the Code of Civil Procedure remains unamended, and Berkeley may claim a justice of the peace as a town of 10,000 inhabitants. The only real importance of this act in the present controversy consists in the light it sheds upon the meaning of the amended provision for the special enumeration of inhabitants of municipal corporations, and, whether constitutional or not, it shows the same intention on the part of the legislature.

Upon the foregoing considerations our conclusion is that in any possible view of the law the office of justice of the peace for the town of Berkeley has had a legal existence ever since the ratification of the freeholders' charter in 1895. The office existing, it could be legally filled, and the title of the incumbent cannot be assailed collaterally in this proceeding.

The next question to be considered is the validity of the ordinance under which the petitioner was convicted. The second section of the ordinance reads as follows: "From and after the first day of October, 1899, it shall be a misdemeanor for any person, either personally or by an agent or agents, or servant or servants, or employee or employees, or as agent, servant or employee, within the limits of the town of Berkeley to sell or keep for sale, or offer for sale, or give away, or permit, for any consideration, to be given away, directly or indirectly, any vinous, malt or spirituous liquors, or any mixture thereof, or any alcoholic or intoxicating liquors of any kind, or to establish, open, maintain or carry on, any tippling-house, dramshop, cellar, saloon, barroom, billiard-room or any other room or place where any such liquors are sold, or kept for sale, or are given away, directly or indirectly, within said town: provided, however, that the provisions of this ordinance shall not apply to the sale of liquors by any licensed druggist upon prescription of a physician regularly

licensed to practice medicine under the laws of the state of California, whose prescription and the sale thereunder, and the name of the person to whom the sale is made, shall be recorded by the druggist in the book to be kept for that purpose, which shall be open for the inspection of any citizen of Berkeley demanding an inspection thereof." A great many objections are urged against these stringent prohibitions, but it will be unnecessary to consider any except those which apply to the mere selling and giving away of intoxicating liquors by persons not regularly engaged in the traffic, such as keepers of barrooms, tippling-houses, etc. The charge upon which the petitioner was convicted was that of selling and giving away malt and spirituous liquors. It is not alleged that he kept a saloon, or that he was otherwise engaged in the traffic, either as a wholesale or retail dealer; and the question is whether the ordinance contains a valid prohibition against the act charged. If it does, it matters not that it may contain other prohibitions which the city has not the power to impose. The ordinance, in that case, would be merely void pro tanto, and its partial invalidity would not affect the judgment against this petitioner. It is claimed upon the authority of Merced Co. v. Helm, 102 Cal. 159, 36 Pac. 399, that a municipal corporation cannot make a single act of selling or giving away intoxicants a crime. But that case has no bearing upon the proposition. That was a civil action to recover a license which was imposed, and could only be imposed, for the privilege of conducting the business; and it was there held, among other things, that a single sale was not carrying on a business in the sense of the license laws. It does not follow from this, however, that a single sale may not constitute a crime if the ordinance so provides, as this clearly does. And the power to pass such an ordinance is granted in the most sweeping terms in section 11 of article 11 of the constitution. It can only be invalidated by pointing out some general law of the state with which it is in conflict, and there is no such law. Counsel concedes that it is well settled that the governing power of a municipality may prohibit the traffic in liquor altogether, so long as the prohibition does not interfere with interstate commerce (Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Ex parte Campbell, 74 Cal. 20, 5 Am. St. Rep. 418, 15 Pac. 318); but he seems to contend that there can be no such prohibition of single sales.

There is no ground, however, upon which this distinction can be maintained. The ordinance is valid if it does not conflict with some general law which makes an exception in favor of single sales. In Ex parte Campbell, supra, the court was careful to say that the case did not involve any question as to the right to sell liquor apart from the traffic, but it was not decided or intimated that a prohibition of single sales was beyond the power of the municipality. In this case—for the first time apparently—that question is directly involved, and we can only say that no law has been called to our attention with which the Berkeley ordinance conflicts.

Counsel claim that this ordinance, and similar ordinances in other cities, if enforced, would cripple a leading industry of the state, and that they are in conflict with the policy of certain laws of the state relating to viticulture. As to the general legislation of the state, it seems to manifest quite as much solicitude for the prevention of intemperance as for the encouragement of wine-making; but, since it is conceded that the traffic in intoxicating liquors may be prohibited by local ordinance, the wine-making industry would not be greatly benefited by upholding the right of individuals not engaged in the traffic to sell or give away an occasional bottle of wine. Another objection to the ordinance is that it prohibits the sale of liquors for chemical purposes. This may result in inconvenience, but we cannot see that it affects the validity of the ordinance. Still another objection to the ordinance is that it creates a favored class, viz., licensed druggists and physicians, who, by combining together, and complying with easy conditions, may carry on a traffic in intoxicating liquors to any extent; for, it is contended, the sale by druggists is not required to be for medicinal purposes, and, if a licensed druggist can only get a licensed physician to furnish the prescriptions, he may sell liquor to the sick and to the well alike. We do not think this argument needs a very serious treatment. Even a penal law would not be so construed as to sanction so manifest an evasion. The ordinance protects only sales in good faith upon regular prescriptions. We think the ordinance is valid so far as it relates to the charge against the petitioner. As to other matters the case calls for no expression of opinion.

In conclusion we will briefly notice the final contention of petitioner, viz., that the complaint does not sufficiently charge

the offense defined in the ordinance. The complaint simply charges that the petitioner sold, etc., without alleging that he was not a licensed druggist, etc. It is said that everything alleged might be true, yet the petitioner entirely innocent, and it is argued the complaint is, therefore, bad. But the rule of pleading, sustained by the weight of authority and of reason, does not support this conclusion. The best short statement of the law upon this point is contained in the opinion of Ellsworth, J., in State v. Miller, 24 Conn. 522, where he says: "The rule as everywhere laid down is that, after words of general prohibition, whatever comes in by way of proviso or exception need not be negatived by the pleader, but must be set up by the accused. In this view it is immaterial whether the proviso or exception be contained in the enacting clause of subsequent section, if it only follows a general prohibition." This statement of the law is sustained by the numerous cases cited in the brief of respondent in which the principle has been applied to laws and ordinances in all respects similar to the ordinance in question here. There are undoubtedly opposing authorities, but they are less numerous, and the decisions are, we think, less satisfactorily reasoned, than those which sustain the rule as laid down by Judge Ellsworth. In our own state there is one reported case in which this question was necessarily involved, and where, without discussion, the rule as above stated was assumed as the basis of the decision: Ex parte Bird, 19 Cal. 130. Where the exception is so connected with the prohibition as to be a part of the definition of the offense, there the rule of pleading is different, and according to all the authorities it must be negatived by the pleader. An instance of this sort is a statute making it penal to carry on a business without a license. In laying a charge under such a statute, where the want of license is the gist of the offense, the want of a license must be alleged: People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402. Here, on the contrary, the offense consists in selling the liquor, and, if the person accused is one of those in whose favor an exception is made, he must allege and prove the fact as matter of defense. We think the complaint was sufficient, and the petitioner is remanded.

I concur: Van Dyke, J.

I concur in the judgment: Garoutte, J.

McFARLAND, J.—I concur in the judgment and in the opinion of the chief justice. I concur in all that part of the opinion which deals with the existence of the justice's court because I think it right; and I concur in all the rest of the opinion because I think that the validity of the ordinance in question, so far as it deals with the sale of wines, etc., has been finally determined by former decisions of this court, from which I dissented: See Ex parte Campbell, 74 Cal. 20, 5 Am. St. Rep. 418, 15 Pac. 318, and Ex parte Christensen, 85 Cal. 208, 24 Pac. 747. I desire to notice, however, that the charge against the petitioner was that he had unlawfully, etc., "sold and given away" certain named liquors. The offense charged, therefore, necessarily included a sale. But the ordinance, going further than the notion of business or traffic, provides that it shall be a misdemeanor for "any person" within the limits of the town of Berkeley "to give away" any "vinous, malt, or spirituous liquors." So that by the terms of this ordinance it would be a public offense punishable by imprisonment for any person in Berkeley, in his own home, and at his own table or fireside, to offer a glass of wine or beer to a guest; and I desire to say that when a petitioner convicted of this time-honored hospitality shall come here for relief I will not feel myself precluded from again inquiring whether or not a personal right guaranteed by the constitution has been violated.

TEMPLE, J., Dissenting.—Soon after this case was submitted, I prepared the annexed opinion, and a judgment discharging petitioner from custody. To that opinion I still adhere, notwithstanding the reasoning of the chief justice. I do not agree with the criticisms upon Miner v. Justice's Court of the Town of Berkeley. The counsel who appeared in that case, with one exception, appear also in this, and all points were then made in favor of the existence of the justice's court which are made here, so far as they then could have been made. The bearing which the new legislation would have upon the matter was, of course, not then considered. The questions discussed in the opinion were the only ones then thought material. The new proposition now made would, at the most, have been only an additional argument against the position then taken by the court. But, in my judgment, there is no force in the argument now made. The joint reso-

lution of the legislature approving the freeholders' charter is not evidence of the population of the town of Berkeley of the most solemn and conclusive character, or at all. No authority is cited in support of this proposition, and I venture the assertion that none exists. In Stevenson v. Colgan, 91 Cal. 649, 25 Am. St. Rep. 230, 14 L. R. A. 459, 27 Pac. 1089, the rule upon an analogous question was stated thus: "When the right to enact a law depends upon the existence of facts, it is the duty of the legislature before passing the bill, and of the governor before approving it, to become satisfied in some appropriate way that the facts exist; and no authority is conferred upon the courts to hear evidence and determine as a question of fact whether these co-ordinate departments of the government have properly discharged such duty." The legislative determination is conclusive upon the courts, so far as the validity of the law depends upon the existence of the facts; and accordingly it was held that in passing upon the validity of a law the court must confine itself to the facts apparent upon the face of the statute. Except as to what have been called "public facts"—such as the existence of a state of war, or martial law, or public disorder, or of certain political facts—the cases do not go further: Luther v. Borden, 7 How. (U. S.) 1, 12 L. Ed. 581. And I repeat the conclusiveness of the supposed legislative finding only obtains as to the question of the validity of the law. Here the question to be passed upon was not whether the town contained 10,000 inhabitants, but whether it contained 3,500. Only so far would it be binding upon parties if it were a judgment of a court. To that extent only could the adjudication go.

The principal opinion also relies upon the special census taken under the amendment of the classification act, which amendment was made in 1899. I have shown—at least to my own satisfaction—that this amendment does not apply to any city or town which could not effect a change of its organization from one class to another; and, further, that after the census has been taken the city does not enter the new class until the reorganization has been accomplished. It was held by Mr. Justice Henshaw that such was the case even under the classification act of 1883: In re Mitchell, 120 Cal. 384, 52 Pac. 799. Section 103 of the Code of Civil Procedure does not provide that cities having a population of 10,000 and not

more than 20,000 shall have a justice of the peace. If this special census was lawfully taken (which I deny) Berkeley did not become a city of the fourth class. Section 103, therefore, does not apply to it. Berkeley did not enter a new class in the mode provided.

It is said that when the first classification act was passed it was intended to include and apply to all municipalities. For one I concede this. There were then no freeholder charters, and but one city could have formed a charter under the constitution as first adopted; and the legislature could amend or change all municipal charters by general laws. It was held that such general laws were laws in regard to the organization of municipalities: City of Los Angeles v. Teed, 112 Cal. 319, 14 Pac. 580; City of Pasadena v. Stimson, 91 Cal. 249, 27 Pac. 604. Since then the constitution has been amended, and now general laws do not affect any cities or towns as to municipal affairs. There can be then no possible purpose for a classification under the constitution except as to cities and towns formed under the municipal incorporation act. The classification for this purpose does not make the reference to the classes for other purposes general laws. Such laws will be special unless justified for other reasons than the reference to such classes. This was elaborately shown by the chief justice in Dougherty v. Austin, 94 Cal. 601, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092. I perceive no effort in the principal opinion to answer the objection that section 103, as amended, is a special law, if it applies to the town of Berkeley. In that respect it is the precise case considered in Miner v. Justice's Court.

We concur: Henshaw, J.; Harrison, J.

"TEMPLE, J.—The petitioner is held in custody for a violation of an ordinance of the town of Berkeley upon a judgment before Robert Edgar, who claimed to be, and acted as, a justice of the peace of the town of Berkeley. The petitioner contends: (1) That under the laws and constitution of the state there is no justice court in the town of Berkeley, and therefore Edgar was not a justice of the peace; (2) the ordinance under which the conviction was had is void, because repugnant to general laws of the state, and also to the state and federal constitutions; and (3) the complaint upon

which he was prosecuted does not show that he has violated the ordinance.

"It was decided by this court in Miner v. Justice Court, 121 Cal. 264, 53 Pac. 795, that there was no justice court in the town of Berkeley. It was said that the effect of the freeholders' charter, adopted in 1895, was to abolish the provision for a justice court in the former special charter, and that the provision made in the freeholders' charter for a justice court was ineffectual. It was also held that an act passed in 1895, purporting to create a justice court in the town of Berkeley, was void, because it was special and local legislation. In 1899 the legislature passed two acts, which, it is contended, together had the effect of providing a justice court for the town of Berkeley. One was an act to amend the classification acts of 1883: Stats. 1899, p. 141. It authorized a special census of the inhabitants of any city or town, and provided that if, from such census, it should appear that the number of inhabitants would entitled the municipality 'to reorganize under a higher or lower class,' proceedings could be inaugurated to that end, and for the election of the officers required for the class to which it was changed, and that upon the qualification of such officers the corporation shall belong to such class. Then follow the provisions which throw doubt upon the purpose and effect of the amendment. They are: 'Whenever the result of such enumeration shall have been declared by the council, board of trustees or other governing body, and entered in the minutes of such body, thereupon the number of such inhabitants so ascertained shall be deemed the number of the inhabitants of such city for all the purposes of this act, and for the purposes of legislation affecting municipalities. The clerk of the council, board of trustees, or other governing body of such city, shall cause a certified copy of such minute order to be filed with the board of supervisors of the county wherein such city is situated.' Counsel differ radically as to the effect of these two sentences. The petitioner contends that the census does not of itself change the class of the city, but only serves the purpose of the act, which is to enable the city or town to reorganize, and enter another class. The respondent argues that, as soon as the census return is entered in the minutes, the city enters a new class, and is thenceforth in the class indicated by the census return. But the presumptions are all against this construc-

tion. The purposes of the classification required by the constitution are for the incorporation and organization of cities and towns only. In regard to laws not for such purposes the classification is not one made by the constitution, in regard to which legislation may be had without incurring the risk that such legislation may be special or local. No doubt the classes might be referred to in legislation as conveniently indicating the subjects of legislation; but when so referred to in statutes in regard to other matters than the incorporation and organization of cities and towns the legislation must be general, or the failure to include all must be justified by intrinsic differences: Rauer v. Williams, 118 Cal. 402, 50 Pac. 691. Whatever plausibility there was formerly in contending that the classification could apply to cities and towns other than those organized under the general municipal incorporation act, there is none since the constitutional amendments of 1896, which deny to the legislature the power to control the charters of cities and towns as to municipal affairs. Whatever meaning may ultimately be given to the phrase 'municipal affairs,' I have no doubt it will include all matters pertaining to the incorporation and organization of such cities and towns. It is not to be presumed that these cities and towns are to be classified whose organization cannot be controlled or affected by the legislature. Apparently now no such legislation is possible save as to cities and towns organized under the general incorporation act, and that must be by amending the general municipal incorporation act. The legislature could not have intended that the mere taking of the census should of itself raise the city to another class. The impracticability of this is shown in Rauer v. Williams, supra, and the proposition is amplified by Mr. Justice Henshaw in his concurring opinion: In re Mitchell, 120 Cal. 384, 52 Pac. 799. This proposition may be said to be the basis of that decision. In view of this construction we are not at liberty to suppose that it was intended that the town of Berkeley should, by merely entering the return of the enumeration, pass to another class of cities. Having a freeholders' charter, there would be nothing accomplished by such classification. The number of the inhabitants so ascertained may be deemed the number of the inhabitants for the purposes of legislation without changing the classification of the town—supposing it to be a town which could be included in the classification.

As we have seen, except for purposes of incorporation and organization, cities and towns may as well be referred to as containing a stated number of inhabitants as by referring to the classes.

"The other statute referred to, passed in 1899, consists in an amendment to section 103 of the Code of Civil Procedure. The former section, for the purpose of providing for justices of the peace in some cities, made a classification of cities having 10,000 and not more than 20,000 inhabitants, and cities having 20,000 inhabitants and not more than 100,000. The new section provides justices of the peace for cities of the second, third and fourth classes, but excepts from its operation cities and towns organized under the general municipal incorporation act. Berkeley is a city of the fifth class, and no justice of the peace is provided for cities of that class in section 103 as amended. It is contended that by virtue of the special census, and the return thereof, Berkeley became a city of the fourth class, for which class of cities a justice of the peace is provided in the amended section. Berkeley was not reorganized under the act so as thus to become a city of the fourth class, and, having a freeholders' charter, it cannot be. It has, therefore, not become a city of the fourth class, and under the decision in Miner v. Justice's Court, supra, it still has no city justice of the peace.

"It is further contended by the respondent that the city of Berkeley has a justice court by virtue of the constitution, irrespective of the legislative action or nonaction. This contention is based solely upon the proposition that section 1, article 6, declares that the judicial power of the state shall be vested in certain named courts, in which are included justices of the peace; and section 11 of the same article provides that the legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities and towns, and shall fix by law their powers, duties and responsibilities. At the best this but declares that it is the duty of the legislature to provide such courts, but the constitutional provision cannot be self-operative. In the absence of legislation, the justices cannot be elected; and, if they could be elected, they would have no duties or powers.

"I conclude that there is no city justice of the peace for Berkeley, and that the petitioner is illegally held."

## DOWNING v. RADEMACHER et al.*

### L. A. No. 809; November 28, 1900.

62 Pac. 1055.

**Mines and Minerals—Quieting Title.—An Amended Complaint** in an action to quiet title to an interest in a certain mining claim was filed several months after the filing of the original complaint, and alleged that plaintiff then was, and at all times therein mentioned had been, the owner of such interest, there being no other time mentioned in the pleadings, and no demurrer thereto. There was a finding that defendant conveyed the interest by deed of a date prior to the filing of the original complaint, and that plaintiff practiced no fraud in obtaining such deed, which finding was not questioned on appeal. Held, that the finding sustained an averment of ownership prior to the time the complaints were filed.

**Mines and Minerals.—Action was Brought to Quiet Title to an Undivided** two-thirds interest in a certain mine, the claim being founded on a contract whereby plaintiff was to have such interest, and was to deliver one-third of the output to defendants. The decree adjudged plaintiff the owner in fee of a thirty-two sixtieths interest, and that defendants had no title thereto, and enjoined the latter from setting up any claim to such interest adverse to plaintiff, similar provisions being decreed as to the interests of defendants. Held, that the decree did not cut off defendants from claiming one-third of the minerals under the contract, since the interests as adjudged were undivided, the owners becoming tenants thereof in common.

**Mines and Mining—Cancellation of Deed.—Where an Undivided Interest** in a mining claim is conveyed in consideration of the grantee's agreement to work the mine and deliver one-third of the minerals to defendant, and do certain other acts in the future, their performance not being made a condition subsequent, a mere failure to perform on the part of the grantee does not constitute a failure of consideration, so as to warrant cancellation of the deed.

**Mines and Minerals.—Where an Action is Brought to Quiet Title to an Undivided** interest in a mining claim, such interest having been conveyed in consideration of a certain contract, whereby plaintiff was to work the mine as he saw fit, and deliver one-third of the output to defendant, plaintiff cannot be required to work the mine, as a condition on which his title will be quieted, since his contract is incapable of being specifically enforced.

APPEAL from Superior Court, Kern County; J. W. Mahon, Judge.

*For subsequent opinion in bank, see 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385.

Suit by E. Downing against Aleck Rademacher and others to quiet title to certain land. From a judgment in favor of plaintiff, defendants Aleck Rademacher and T. M. Osmont appeal. Affirmed.

T. M. Osmont for appellants; Louttit & Middlecoff and J. W. Ahern for respondent.

CHIPMAN, C.—Action to quiet plaintiff's title to an undivided two-thirds interest in a certain mining claim, known as the "Baron Mine," in the Randsburg district. Judgment in the usual form was entered, quieting plaintiff's title to thirty-two sixtieths of the mine, also quieting the title of defendant Middlecoff, grantee of plaintiff, to eight-sixtieths, and the remaining twenty-sixtieths to defendants and appellants Rademacher and Osmont. The appeal is from the judgment, on the judgment-roll alone. There was a motion for a new trial, but there is no appeal from any order made on the motion, and hence the fragmentary statement found in the transcript cannot be considered. It appears from the findings that on January 11, 1897, Rademacher was the owner of the Baron mine, and on that day he conveyed two-thirds thereof to plaintiff. The finding of the court is as follows: "That the claim of title of the plaintiff herein to said mill and mining property is founded solely on said conveyance made by defendant Rademacher to the plaintiff on the eleventh day of January, 1897, and said contract, Exhibit B, made at the same time with said deed; . . . . that plaintiff claims that said conveyance was made to him in consideration of the covenants and undertaking on his part contained in said contract, Exhibit B." As the case depends somewhat upon the terms of this contract, at least a general statement of its provisions is necessary. It recites that, whereas Rademacher has granted to Downing an undivided two-thirds interest in the Baron mine, "now, for the purposes of working said mine, said parties agree as follows." Downing was given the exclusive right to work the mine as he should see fit. "He shall mill and reduce all of the mineral ore taken out of said mine by him, and deliver to the said party of the second part [Rademacher] one-third of all the gold or other minerals taken from said ore by said first party [Downing] free of cost and expense to said party of the second part."

Downing was "to use his best endeavors to find water on said mining claim or near the same," and meanwhile was to take water from a well belonging to Rademacher. Downing was to have the right to erect any mills on the property or on other mining claims of Rademacher. Downing had the right to take any quantity of ore from the Baron mine that he might desire, and "have it milled wherever he pleases, provided always that he shall deliver to said Rademacher one-third of all of the gold and other products of said mining and milling." There was a provision that Downing would save Rademacher harmless from any demands of one Putnam and one Nidiver "for work they have done on said Baron mine, and will see that said Putnam and Nidiver are paid fair wages for the work they have done on said Baron mine; and all the ore now on said mine, milled by said Putnam and Nidiver for said Rademacher, is included in this contract, and said Downing may mill the same, and give one-third of the mineral taken therefrom to said Rademacher." There is a provision that Downing will defend at his own cost any lawsuits that may be commenced against Rademacher concerning the mine, and Downing may select the attorneys in any such suit, but shall not be liable for any judgment that may be rendered against Rademacher. The contract gave Downing the right to control certain litigation then pending in Kern county against Rademacher, and Rademacher released Downing and the plaintiffs in that action from all costs and damages caused to Rademacher by an injunction in said action. Middlecoff's interest comes from a deed by plaintiff to him after the deed to Downing was executed. It appears also that plaintiff conveyed thirty two-sixtieths to one Hyde, but that it was by way of and as a mortgage; and the court refused to order Hyde to be made a party defendant, for the reason that he had no interest in the property, except as mortgagee. The court found that neither said conveyance to Middlecoff nor said mortgage to Hyde "was made in violation of said contract, Exhibit B, nor without the knowledge or consent of said Rademacher, nor did said conveyance, or either of them, disable said plaintiff from performing said contract, Exhibit B, without the consent of his said vendees or otherwise." And there is a finding that both these conveyances "were made in good faith and for value," and that neither of them was without consideration. The court also

found that Downing "has endeavored, but is not now endeavoring, to sell and dispose of said mining property, but such endeavors were not without the consent of said defendants"; that he gave a written option to a third party to purchase said mine, but no sale was made, and it expired December 15, 1898; and that Downing sought defendants to join in said option, but they did not join.

1. Appellants contend that the complaint does not state a cause of action. The original complaint was filed April 28, 1898, and the amended complaint was filed September 20, 1898, and alleges "that plaintiff now is, and at all the times herein mentioned has been, the owner in fee," etc. No other time is mentioned in the pleading, except the date of the location of the mine by Rademacher, to wit, December 27, 1894, which it is claimed is not a "time" referred to in the averment, and hence there is no allegation of ownership at the date of the commencement of the action, and the complaint must fall. There is no demurrer. There is a finding that plaintiff became the owner of two-thirds of the mine on January 11, 1897; and this finding is based on a finding that Rademacher conveyed to plaintiff by deed of that date, on which date, also, they entered into an agreement reciting that fact. Rademacher's defense to this deed is that he executed it, if at all, through the artifice and fraud of Downing, on which issue the finding is against Rademacher, and is not now questioned. We must assume that the evidence supported the finding that Rademacher conveyed to Downing January 11, 1897, and this was before any complaint was filed. The findings support the averment of ownership at the time the complaint and the amended complaint were filed.

2. The decree adjudges that Downing was at the commencement of the action "the owner in fee and in the possession of an undivided thirty-two sixtieths interest," etc., and enjoins Rademacher, Osmont and Middlecoff, and each of them, "from setting up any claim to said undivided thirty-two sixtieths of said property, or any part thereof, adverse to plaintiff." Similar provision is decreed as to the respective interests of the other parties last above named. Appellants contend that the decree forever cuts them off "from claiming one-third or any proportion of the minerals extracted from said mine, in so far as the plaintiff's interest (thirty-two sixtieths) is concerned; and this because the decree, among

other things, adjudges that neither of appellants has 'any right, title, or interest whatever in said thirty-two sixtieths of said property owned by said Downing, or any part thereof.'" The interests as adjudged to the several owners are undivided, and the owners became tenants thereof in common. The decree does not adjudge that plaintiff is entitled to any particular thirty-two sixtieths, together with the minerals therein contained, and no such construction can be given it. Each cotenant has an undivided interest in every portion of the mine, and the decree does not, in our opinion, adjudge or attempt to adjudge the rights of the parties to the minerals. Of course, the minerals go with the land, and each cotenant is entitled to his proportionate share of the minerals of every part of the mine.

3. Appellants further contend that the decree should either (1) have rescinded or annulled the deed and contract; or (2) there should have been ingrafted on the decree the obligation on plaintiff's part to carry out the contract known as "Exhibit B," which it is claimed was the consideration for the deed, or should charge plaintiff's title with a trust in favor of Rademacher and Osmont. This is what Rademacher and Osmont prayed for in their answer and cross-complaint. It is doubtful whether the findings can be construed as showing by a definite statement that the conveyance to plaintiff was in consideration of the contract executed by him. But, treating the contract as the consideration moving from Downing to Rademacher, does the case differ in principle from Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382? The question of fraud was eliminated in that case, as it is in this, and there remained, as was said by the court, as there remains here, "the plain, simple question whether a conveyance of real estate, fully executed on the part of the grantor, can be set aside for a failure of consideration, on the sole ground that the promises and agreements which induced its execution, and which by the terms of the contract under which the deed is made were not to be performed until after its execution, have not been performed." It was further said in that case, as it may be said in this: "It must be borne in mind that the plaintiff did not contract to convey upon the performance of the contract on the part of the defendants. Therefore his promise was not dependent upon theirs; nor was there anything appearing in the

deed, or in the contract under which it was made, showing or tending to show that a compliance with their promises was regarded as a condition subsequent, or that a failure to perform on their part should in any way affect the title conveyed to them." The contract now before us starts out with the whereas that Rademacher "has this day granted to" Downing "an undivided two-thirds," etc. "Now, for the purposes of working said mine, said parties agree as follows." There is no intimation that any failure on Downing's part shall forfeit the interest conveyed to him, or shall entitle Rademacher to a reconveyance of such interest. On the face of it, the contract simply gives to Downing the exclusive right to work the mine upon the terms stipulated, "as he may see fit, and operate the same as he may see fit, . . . . and to take any quantity of ore therefrom which he desires, and have the same milled wherever he pleases, provided, always, that he shall deliver to said Rademacher one-third of all the gold and other products of said mining and milling." Doubtless Rademacher expected that Downing would go forward and operate the mine for their mutual benefit, and no doubt his expectations in this regard formed part of the consideration, and the chief consideration, in his mind, for making the deed. Nevertheless he exacted no promise, and none was made, that the deed should be inoperative if Downing failed to perform. In the matter of working the mine Rademacher trusted Downing, and he did not convey or contract to convey to Downing upon condition that Downing would perform. Neither did he impose any condition in the deed or in the contract tending to show that a compliance on Downing's part was regarded as a condition subsequent, or that Downing's failure to perform should affect the title conveyed to Downing. So far as we can see, Rademacher is in the same position, precisely, as Lawrence in his controversy with Gayetty, supra. In the present case Rademacher is asking the court to cancel the deed, or, if that cannot be done, then to require Downing to perform, as a condition upon which his title will be quieted. Clearly, we cannot cancel the deed, there being no fraud in procuring its execution. Appellants concede that the contract is utterly incapable of being specifically enforced, and, if that be so, how can we make specific enforcement a condition upon which Downing's title will be quieted? Can a court impose a condition which it is admitted the court cannot en-

force? We think not. Shorn of this question of fraud, the case presents at most a failure of consideration; and upon principle it is immaterial that the consideration took the shape of an agreement to work the mine and pay Rademacher a share of the proceeds, rather than an agreement to pay a given sum of money, for which Downing had given his promissory note. But, had the consideration been a promise to pay money, no one would contend that simply upon a failure by the vendee to pay the purchase money the vendor could have his deed canceled. Anticipating the conclusion above stated, appellants finally invoke the maxim that he who asks equity must do equity, and they claim that relief should be denied to plaintiff until he has first performed his contract. The court found "that a sufficient consideration did pass from said plaintiff to said Rademacher for said deed." Also, "that immediately after the execution of said contract, Exhibit B, and said deed, plaintiff took possession of said mine and proceeded to work and operate the same, but he has not extracted therefrom . . . . any more than a very small amount of valuable mineral-bearing ores; that he has disposed of a small amount of mineral ore taken from said mine, but has not appropriated the receipts to his own use; that he has paid the claims of said Nidiver and Putnam," and, as before stated, has paid Rademacher more money than was due him for any ores or mineral extracted from the mine. It is also found that plaintiff sold an undivided eight-sixtieths of the mine to Middlecoff, and mortgaged an undivided thirty-two sixtieths to Hyde, "but neither said conveyance . . . . nor said mortgage . . . . was made in violation of said contract, Exhibit B, nor without the knowledge or consent of said Rademacher, nor did said conveyance, or either of them, disable said plaintiff from performing said contract, Exhibit B, without the consent of said vendors or otherwise"; that each of said conveyances was made with full notice of the rights and title of defendant Rademacher, and was made in good faith and for value, and "that, since said contract was made, plaintiff has endeavored, but is not now endeavoring, to sell or dispose of said mining property, but such endeavors were not without the consent of said defendants"; that the option given to purchase the mine expired before the decree was entered in the case. It appears also from the findings that "Rademacher on March 2, 1898, commenced an

action in the superior court of the city and county of San Francisco against said Edward Downing to annul said conveyance, whereupon the plaintiff, Edward Downing, instituted the present action." Under this state of facts, we do not think Rademacher can defeat the action by resort to the maxim above referred to. Cases are cited by appellants where mortgagors have been denied equitable relief against an outstanding mortgage barred by limitation, without first doing equity by paying the mortgage. But this is not such a case. This action is the counterpart of Rademacher's action against Downing to cancel the latter's deed, which is the same kind of action as Lawrence v. Gayetty, supra, the only apparent difference being that Downing is the moving party here. The governing principle in the two cases is the same. We do not think that Rademacher has made such a case here as would justify us in denying plaintiff the relief sought. There is nothing to show that Downing has abandoned his contract, or is disabled from carrying it out, or has refused to do so. We advise that the judgment be affirmed.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## FILIPINI et al. v. TROBOCK et al.*

S. F. No. 1676; November 30, 1900.

62 Pac. 1066.

**Mortgage Foreclosure—Statute of Limitations.—Where the Trial Court Finds** facts showing that a suit to foreclose a mortgage is not barred, failure to find expressly that the suit is not barred is immaterial.

**Mortgage—Estoppel.—Where the Vendee in an Unrecorded Deed,** acting as attorney in fact for the vendor, procures a mortgage for the latter on the property, and represents that the vendor is the owner, he is estopped thereafter to set up title to the land except in subordination to the mortgage.

*For subsequent opinion in bank, see 134 Cal. 441, 66 Pac. 587.

**Mortgage—Estoppel.**—Where the Vendee in an Unrecorded Deed, acting as attorney in fact for the vendor, procures a mortgage on the latter's property, and represents that the vendor is its owner, one succeeding to his interest as a mere volunteer is equally estopped to set up title except in subordination to the mortgage.

**Mortgage Foreclosure.**—Error in Admitting Secondary Evidence to prove a note in a suit to foreclose a mortgage given as security is waived by failure to object at the time.

APPEAL from Superior Court, City and County of San Francisco; James M. Trout, Judge.

Suit by P. Filipini and others, trustees of Galileo Grove, U. A. O. D., against Mary Trobock, impleaded with Antonio Trobock and others. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

P. A. Bergerot (Rodgers, Paterson & Sloan of counsel) for appellant; I. J. Truman, Jr., for respondents.

SMITH, C.—Judgment was rendered by the lower court against the appellant, Mary Trobock, and her codefendant Antonio Trobock, for the foreclosure of a mortgage for $2,000 and interest, executed to the plaintiff by the latter. Mary Trobock appeals from an order denying her motion for new trial.

1. The main question in the case is whether the action was barred, as against her, by the statute of limitations. The facts bearing on this question, as they appear from the pleadings and findings, are as follows: The complaint was filed July 23, 1896. The mortgage and note—which were payable three years after date—were executed December 8, 1886, in the name of Antonio by Nicolas Trobock (husband of appellant), his attorney in fact, who represented to the plaintiff's trustees and attorney, and induced them to believe, that the money was borrowed for Antonio Trobock, and that he was the owner of the land mortgaged; and the title in fact so appeared from the records in the recorder's office. But in fact a deed had been made by Antonio to Nicolas Trobock in 1870, though never recorded, and the latter knew of this condition of the title. Nicolas died in 1889. The unrecorded deed was found among his papers by his wife, the appellant, and recorded September 2, 1889, and in the year 1890 the

land was distributed to her by the final decree of distribution. The interest on the note and mortgage was paid by Nicolas during his lifetime, and afterward, up to August 1, 1893, by the appellant. Antonio Trobock has been absent from the state of California, and a resident of Raguzza, Austria, ever since the maturity of the note. The specific objection of the appellant is that there is no finding as to appellant's plea that the action was barred by the provisions of section 337 of the Code of Civil Procedure. But I think the issue was disposed of by the finding of the specific facts as stated above, and it was unnecessary to find expressly that the action was not barred by the provisions of the section of the statute relied on. The unrecorded deed from Antonio to Nicolas, held by the latter at the time of the mortgage, was void as to the mortgagee, the plaintiff in this case: Civ. Code, sec. 1214. The representations of Nicolas to the plaintiff's officers to the effect that Antonio was the owner of the land mortgaged were, therefore, so far as the mortgage was concerned, in effect, true; and whatever title had accrued to him under the deed from Antonio became, by his own deliberate written act, subject to the mortgage. He probably so understood the effect of the transaction; and in view of the presumptions that a person is innocent of wrong, and that he intends the ordinary consequence of his voluntary act, it is to be presumed that he so understood it: Code Civ. Proc., sec. 1963, subds. 1, 3. But, however this may be, Nicolas was, at all events, estopped by his express declarations as to the ownership of the property from setting up title in himself except in subordination to the mortgage: 1 Herm. Estop., sec. 3; 2 Herm. Estop., secs. 730 et seq., 736; Code Civ. Proc., sec. 1962, subd. 3; Civ. Code, sec. 1709. And the estoppel is equally binding on his wife, the appellant, who succeeded to his interest as a mere volunteer: 1 Herm. Estop., sec. 20; Bigelow, Estop., pp. 512, 607, 608. Mrs. Trobock stands, therefore, precisely in the position of her predecessor. She took the title subject to the mortgage, and is equally estopped to deny that Antonio was the owner, and that, in the absence of a conveyance by him, he continued to be the owner.

2. It is also claimed that the court erred in admitting secondary evidence of the note, but I do not think the objection tenable. The note was proved by the mortgage and other evidence without objection. The subsequent objections to it

came too late: Wright v. Roseberry, 81 Cal. 91, 22 Pac. 336. I advise that the order denying the motion for new trial be affirmed.

We concur: Haynes, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order denying the motion for new trial is affirmed.

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## HALLINAN v. HEARST et al.*

S. F. No. 1756; December 3, 1900.

62 Pac. 1063.

**Money Received—Contributions for Relief.**—Where defendant, the publisher of a newspaper, received a sum of money in response to solicitations in his paper for contributions for the relief of families of three firemen who lost their lives in the performance of their duty, plaintiff, as heir of one of the firemen, cannot maintain an action to recover his part of the amount collected, as money had and received, since the transaction created no legal right in plaintiff to any part of the money.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Thomas E. Hallinan, by his guardian, against W. R. Hearst and others. From a judgment in favor of defendants and from an order denying a new trial plaintiff appeals. Affirmed.

Ben B. Haskell for appellant; Garret W. McEnerney for respondents.

McFARLAND, J.—This is an action at law for money had and received, brought by plaintiff, through his guardian, against the defendant Hearst. Judgment went against the plaintiff, and he appeals from the judgment and from an order denying his motion for a new trial. The main features of the case are these: On June 6, 1897, Timothy Hallinan,

*For subsequent opinion in bank, see 133 Cal. 645, 55 L. R. A. 216, 66 Pac. 17.

John Moholy and Frank Keller, who were firemen, lost their lives in the performance of their duty in a fire in San Francisco. Immediately afterward the respondent Hearst, through his newspaper, the "Examiner," commenced to solicit contributions for the benefit of the families and dependents of these deceased firemen, and he himself gave $200 to the fund. In the articles published in the "Examiner" on the subject, and in letters written by some of the contributors, there were general expressions about the purposes intended, of which the following are fair samples: "In aid of the families of the firemen killed," "to assist those dependent upon the firemen," "those whom they supported," "for the benefit of the dependent relatives of these firemen," "for the families of the brave firemen," "for the relatives of firemen heroes," etc. There is nothing more specific or definite on the subject than is to be gathered from the foregoing expressions. Under these circumstances contributions in money were made by numerous persons to the respondent, the aggregate amount of which was $5,905.25, and respondent charges himself in an additional sum of $114.20 for interest, etc. The appellant, who is quite a young boy, is the only child and the only member of the family of the deceased fireman Hallinan, and he made demand of respondent that he pay over to appellant the one-third of said money. Respondent refused to comply with the demand, and thereupon this action was commenced.

It appears that respondent sought the advice of three well-known gentlemen of the city as to the manner in which he should distribute the money as aforesaid. They made a written report to him in which they advised him to place one-third of the money in trust in one of the trust companies of the city, to be paid to appellant at his majority. They gave the same advice as to the minor children of the deceased fireman Moholy; and as to the other deceased fireman, Keller, they advised that the remaining third be immediately distributed to his two sisters and the lady to whom he was engaged to be married, they being all of legal age. They also advised that, if either of the above-named minors should die before majority, his share should go to the charitable Fund Association of the San Francisco Fire Department. In accordance with this advice, respondent paid one-third of the money to the sisters and fiancee of Keller, and is ready to

deposit the other two-thirds when advised that this litigation is ended. These matters are of no importance in this case, except that it is proper to state them here for the purpose of showing the motives that actuated respondent in refusing to immediately pay over one-third of the funds to the appellant.

Of course, this suit is brought upon the theory that appellant has a legal present right to one-third of the fund above described, and may immediately recover it of respondent in an action for money had and received; but this theory is not well founded. The transactions above stated created no legal right in appellant or in any other person to one-third or to any part of the money placed in the hands of the respondent. There was no contract specific enough to be the foundation of any legal right in appellant. The distribution of the fund, the persons to whom it should go, the proportion that each should have, and the kind of disposition of it which would be most beneficial to the recipients, were all matters which were, in the first instance, at least, to be determined by the respondent. And it is well for people to understand that when contributions are made in the general, loose way in which those in question were made—there being no definite contract whatever on the subject—the contributors must mostly rely on not only the integrity, but the good judgment and wise discretion, of the person or persons to whom the money is given. Whether in such a case, if the money should be kept for his own use by the person to whom it was given, the contributors could recover it by an action at law, or whether a court of equity, in a proper bill, and with the proper parties before it, could by a decree devote it to the original charity, or, that becoming impossible, to some other charity, under a doctrine analogous to that of cy pres, are questions not involved in this action. In the judgment the court decreed certain things—as, for instance that application might be made to the court for leave to use such of the money as may be necessary for the proper support and maintenance of appellant during his minority—which may be of questionable authority, under the pleadings; but as these things are for appellant's benefit, and as he has no standing in this case, he is in no condition to complain of these parts of the judgment. The judgment and order appealed from are affirmed.

We concur: Henshaw, J.; Temple, J.

# CITY AND COUNTY OF SAN FRANCISCO v. CENTER et al.*

S. F. No. 1512; December 10, 1900.

63 Pac. 35.

**Judgment.—In a Former Action Brought by Defendants Against Plaintiff** to quiet title, the judgment quieted title in defendants, with a proviso that nothing in the decree should impair the rights reserved in the Van Ness ordinance to the plaintiff, over lands that had "then been occupied or set apart" for public use. The opinion of the supreme court deciding that case held that all the rights which the plaintiff had, and which could be conveyed by said ordinance, had passed to defendant's grantor at a time shortly after the passage of such ordinance. Held, that the expression "then occupied or set apart," as used in the judgment, had reference to the date of the passage of the ordinance, and not to the date of the commencement of the action to quiet title, or the decree therein.

APPEAL from Superior Court, City and County of San Francisco; Charles W. Slack, Judge.

Action by the city and county of San Francisco against John Center and others. From a judgment in favor of plaintiff and an order denying a new trial defendants Leroy appeal.

Platt & Bayne and E. S. Pillsbury for appellants; James L. Gallagher for respondent.

CHIPMAN, C.—Ejectment. Plaintiff filed its complaint in this action November 29, 1886, to recover possession of a strip of land extending from Ninth to Eighteenth street, in the city and county of San Francisco, and which was formerly Mission creek. Among the defendants, of whom there is a large number, were Eugene and Georges Leroy, who claimed ownership in and possession of a portion of the land in question, to wit, the northerly and westerly half of Mission creek, extending from Eleventh street (known as "Wood Street" on the Van Ness map) westerly and southerly to a point distant about twenty-six feet four and three-fourths inches southerly from the southerly line of Alameda street extended

*For subsequent opinion in bank, see 133 Cal. 673, 66 Pac. 83.

westerly through this land. The Leroy land embraces quite a large tract, but only the part within the creek is in question. Judgment was given in favor of plaintiff against the Leroys, except as to a small, four-sided tract of land, about twenty-five feet square, situate at the southwest corner of Alameda and Columbia streets, as to which the Leroys had judgment. From that portion of the judgment in favor of plaintiff the Leroys have appealed, and bring the record here by bill of exceptions. No other defendants appeal.

Plaintiff claimed to be seised in fee in trust for the use of the state and for the people of the city and county of San Francisco, and it based its claim of title upon a patent issued by the United States government June 20, 1884, to plaintiff for its pueblo lands; the decree of the United States circuit court in the case of City of San Francisco v. United States, entered May 18, 1865, confirming the claim of the city to its pueblo lands; and the act of Congress approved March 8, 1886, also confirming said claim. The decree and the act of Congress are printed in full in 138 U. S. 663, and Municipal Reports San Francisco, 1886–87, Append. 155. The Leroys claimed under decree of the circuit court of the United States, quieting their title against the city and county, and adjudging that they were on, and have been since, October 26, 1883, the owners in fee of the land now claimed by them. On appeal to the supreme court of the United States this decree was affirmed (City and County of San Francisco v. Leroy, 138 U. S. 656, 34 L. Ed. 1096, 11 Sup. Ct. Rep. 364), with the following modification, as shown by the certified copy of the decree: ". . . . By adding the declaration that nothing therein shall be deemed to impair in any respect the rights reserved in the Van Ness ordinance to the city of San Francisco, or its successor, the city and county of San Francisco, over lands that had then been occupied or set apart for streets, squares, and public buildings of the city, and as thus modified be affirmed." This decree is dated March 2, 1891, and was filed in the United States circuit court at San Francisco December 1, 1891.

Appellants first devote much attention to the proposition that the burden of proof was upon plaintiff to show that there were rights reserved to it under the Van Ness ordinance that would be impaired by the decree pleaded by appellants; they claim, second, that, if the burden was upon defendants,

then they, with the assistance of plaintiff, made the proof; and, third and lastly, if any rights in the land covered by Channel street and Mission creek were reserved to the city under the Van Ness ordinance, these rights ceased to exist, because this street and the creek were abandoned by the city.

It becomes necessary to determine at the outset to what period of time the modification of the Leroy decree by the United States supreme court related. Plaintiff contends that it had reference to the date of the decree as entered in the United States circuit court, which was June 14, 1887. Defendants claim that the modification had reference to the situation as it existed when the Van Ness map was made, showing the reservations then made by the city for streets, etc., under the Van Ness ordinance. The importance of the question lies in the fact that there were other maps made and adopted by the city, subsequent to the Van Ness map, which show that reservations additional to those indicated by that map were made before the decree was entered in favor of the Leroys, and which changed the relation of certain streets to Mission creek, and changed somewhat, apparently, the course and width of Channel street. The opinion of the supreme court was written by Mr. Justice Field, and to this opinion we may look to aid us in arriving at the meaning of the formal decree as subsequently entered by the clerk of the court. It appears from the opinion that in the action brought by the Leroys they deraigned title through William J. Shaw, who derived title through Kissling, Thorne and Center, and one Stewart, whose several titles the court held had been fully established under the Van Ness ordinance, running back to a date contemporaneous with that ordinance; that "the title to the lands thus claimed by Kissling and by Thorne and Center, and by Stewart as a purchaser from them of four and a half acres, became, by operation of that ordinance and the confirmatory legislation mentioned, vested in those parties, and by their conveyance passed to William J. Shaw, and was by him conveyed to Eugene L. Sullivan, and thence to the plaintiffs [Leroys] in this suit." The opinion further reads: "All the right, title and interest which the city held, and which could be conveyed under the Van Ness ordinance, had, therefore, passed to Shaw when the suit to quiet his title was commenced and carried to judgment in the district court of the twelfth judicial district of the state, and what-

ever benefit Shaw had acquired by that decree in his favor inured to the benefit of his grantees, the public rights reserved by the Van Ness ordinance being necessarily excepted." The suit here referred to was begun by Shaw on March 28, 1861, and a decree was entered in his favor February 5, 1862, from which no appeal was ever taken. The opinion proceeds: "One of these [i. e., "public rights"] was a reservation, notwithstanding its grant, of lands then occupied or set apart for public squares, streets and sites for schoolhouses, city hall and other buildings belonging to the corporation; and the decree in this case should have excepted from its operation lands thus reserved." After discussing the claim of Shaw in the suit above referred to, arising from a deed to him of the tide land commissioners, the opinion continues: "There was therefore nothing in the deed of the tide land commissioners which could by any possibility impair the right of the city to exercise the power reserved in the Van Ness ordinance over such portions of the lands conveyed to occupants under that ordinance as had been occupied or set apart for streets, squares and public buildings of the city. Such a reservation should have been embodied in the decree in this case." The opinion concludes as follows: "The decree should therefore be modified by adding the declaration that nothing therein shall be deemed to impair in any respect the rights reserved in the Van Ness ordinance to the city of San Francisco or its successor, the city and county of San Francisco, over lands that had then been occupied or set apart for streets, squares and public buildings of the city, and as thus modified be affirmed; and it is so ordered." We have quoted in an earlier part of this opinion the language of the decree as modified, which modification is identical with that in the concluding paragraph of the opinion of Judge Field. Having in view the facts stated by Judge Field relative to the Shaw title, which is the origin of the Leroy title, it seems quite clear to us that the modification of the Leroy decree relating to the reserved rights of the city had reference to those rights as they existed at a date certainly no later than the Van Ness map, which set forth the reservations then claimed by the city under the Van Ness ordinance. In making subsequent maps and passing subsequent ordinances the city could not destroy any rights that had attached in favor of settlers or occupants of land confirmed to them by the

Van Ness ordinance and by the acts of the legislature ratifying the action taken by the city under that ordinance.

The Leroys brought their action to quiet their title October 26, 1883, and it was still pending on appeal to the supreme court and undecided when, on November 29, 1886, the city brought this present action. If the Leroy decree had not been modified it would have been conclusively determinative of the rights of the Leroys to at least some portion of the disputed land; and being modified in the particular already noticed, and being in all other respects affirmed, the only question is as to what, if any, reservations of the land in controversy did the city make by the Van Ness map. The other maps introduced in evidence—the engineer's map, so called (adopted 1866), and the Humphreys map (adopted 1870)—are of dates subsequent to the Van Ness map, and subsequent to the inception of Shaw's title, as we understand the facts in the Leroy suit against the city. The Van Ness map must therefore govern in determining what reservations were made by the city that in any way conflict with the Leroy lands. The subsequent maps and ordinances may possibly throw some light on the Van Ness map, and aid in arriving at its meaning; but they cannot take the place of that map in the sense that by them, and not by the Van Ness map, are the rights of the present parties to be determined. The trial court evidently took into consideration not only the Van Ness map, but also the engineer's map and the Humphreys map (which latter, it is agreed, is identical with the engineer's map so far as the land in controversy is concerned), and also other facts, such as that the city had fenced the lands it now claims; that Mission creek had been filled by the city; and other facts occurring since the Van Ness ordinance was passed, and that appeared in evidence. It is also manifest that the trial court regarded the modification of the Leroy decree as relating to its date or to the beginning of their action, and that the findings of the court were more or less influenced by these later maps, and by evidence as to reservations made by the city in some degree, at least, different from those indicated by the Van Ness map. The location of Mission creek with reference to Channel, Alameda and Columbia streets is different on the Van Ness map from its location on the Humphreys map. On the Van Ness map Mission creek is shown to run west of Columbia street, while

on the Humphreys map the creek and that street are nearly coincident at and north of Alameda street for some distance. Channel street on the Humphreys map seems to occupy a different relation to the other streets named and to Mission creek from the Channel street delineated on the Van Ness map. Whether or not the city should be concluded by the Van Ness map as to the exact location thereon given of Mission creek, we at this time express no opinion. Under the view we have taken, however, as to the modification of the Leroy decree, we do not think this court should, in the present state of the evidence in this case, undertake to point out the respective rights of the plaintiff and appellants to any particular lands in controversy, or to pass upon any other questions now before the court. The judgment and order should be reversed, and a new trial ordered as to appellants, to be had upon the evidence already taken and such other evidence as plaintiff or appellants, or either of them, may wish to offer, and as to all other defendants the judgment should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial ordered as to appellants, to be had upon the evidence already taken and such other evidence as plaintiff or appellants, or either of them, may wish to offer, and as to all other defendants the judgment is affirmed.

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## PEOPLE v. MACHADO.

Cr. No. 669; December 18, 1900.

63 Pac. 66.

**Larceny.—An Indictment Sufficiently Describes the Stolen** property as "one cow, the same being the property then and there of H."

**Criminal Law—Reasonable Doubt—Instructions.—In a Criminal Case, Refusal** to charge that the jury have a right to consider that innocent men have been convicted, and to consider the danger of

convicting an innocent man in weighing the evidence whether there is reasonable doubt as to his guilt, is proper.

**Larceny.—In a Prosecution for Larceny of a Cow a Witness** had testified to finding on the premises of accused a "slunk" calf—that is, one that had been taken from its mother—and that it had been taken from the stolen cow, to which no objection nor motion to strike out was made. Held, that a question asking for the appearance of the calf as to when it had been taken from its mother, and his answer giving the facts on which his conclusion was based, were not objectionable as assuming that the calf had been taken from "a" cow, not "the" cow—that is, from the stolen cow.

**Larceny.—Where a Witness in a Prosecution for the Larceny** of a cow had testified in reference to a hide found on the premises of accused, but had not testified that any part of a brand on it was indistinguishable, a question, on cross-examination, asking what part of the brand was indistinguishable, was properly excluded.

**Larceny.—A Question to a Witness, "Now, When You Went** to the butcher-shop or slaughter-house for the first time, you didn't go in?" was properly excluded for uncertainty, as it could not be understood whether it referred to the butcher-shop or the slaughter-house.

**Larceny.—Where, in a Prosecution for the Larceny of a Cow,** a witness testified, without objection, to the finding of the carcasses of two calves in a certain locality, a question calling for their condition, and the answer to the effect that they were very much decomposed, which was favorable to accused as showing that they could not have come from the stolen cow, were properly admitted.

**Larceny.—Admission of Testimony as to Statements of a Third Person** to one accused of a crime, though not accompanied with proof of the conduct of accused, was not error, where accused did not move to strike it out.

**Larceny.—In a Larceny Prosecution, a Witness Testifying** that the stolen property belonged to one person cannot be impeached by showing that in another case he had testified that it belonged to another.

**Criminal Law.—A Question of One Witness as to Declarations** of another, who was not himself questioned in relation thereto, was properly stricken out.

APPEAL from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

John Machado was convicted of grand larceny and he appeals. Affirmed.

Grave & Graves for appellant; Attorney General Ford for respondent.

SMITH, C.—The defendant was indicted with another for the crime of grand larceny. The property stolen is described as "one cow, the same being the property then and there of Hathaway and Branch," etc. The indictment was demurred to on the ground of the insufficiency of this description. The description, I think, was sufficiently certain: 12 Ency. Pl. & Pr., pp. 977, 983 et seq.; People v. Littlefield, 5 Cal. 355, affirmed in People v. Ah Woo, 28 Cal. 211; People v. Stanford, 64 Cal. 27, 28 Pac. 106.

It is claimed the court erred in refusing to give the following instruction: "The jury have a right to consider that innocent men have been convicted, and to consider the danger of convicting an innocent man in weighing the evidence to determine whether there is reasonable doubt as to defendant's guilt." The instruction is substantially similar to an instruction refused in People v. Durrant, 116 Cal. 185, 222, 48 Pac. 75, and comes within the ruling in that case.

Objections were made to numerous rulings of the court on the evidence, but none of them are well taken. The witness Avila had testified, without objection, as to finding on the premises of defendant what he called "a 'slunk' calf—that is, a calf that had been taken from the cow"—and was asked, "What was the appearance of the calf, when you saw it, as to when it had been taken from the cow?" The question, and also the answer, which simply gave the facts on which the witness' conclusion was based, were proper. It may be added that the objection was that the question assumed that the calf "had been taken from 'a' cow"; not "taken from 'the' cow"—i. e., from "the stolen cow," as stated in the brief. The witness had testified some time before that the calf was taken from the stolen cow, giving his reasons; but no objection was made, nor was there any motion to strike out. The question to Avila, referring to the brand on the hide found on defendant's premises, and asking, in effect, which part of it was indistinguishable, was properly excluded. The witness had not testified that any part of it was indistinguishable. So, also, the question, "Now, when you went to the butcher-shop or slaughter-house for the first time, you didn't go in?" was properly excluded for uncertainty; i. e., because it could not be understood whether it referred to the butcher-shop or the slaughter-house. The rulings of the court with reference to the testimony of the witness Cook were also unobjec-

tionable. There was no objection to his testimony that he had found the carcasses of two calves in the creek south of the slaughter-house. That evidence had been given without objection. The objection was to the question, "What was the condition of those two carcasses?" and the answer, which was that "they were very much decomposed," was favorable to the defendant as showing that they could not have come from the stolen cow. Nor was it error to allow the question as to what was said by Martinez to the defendant on the occasion referred to in the question. The rule is that such evidence is proper, but must be accompanied with proof of the conduct of the accused, in default of which it may be stricken out: People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; People v. Mallon, 103 Cal. 513, 37 Pac. 512. The prosecution did not offer the additional proof, but there was no motion to strike out. Indeed, the answer could not have had any influence on the minds of the jury, and, if erroneous, would have been harmless. The questions asked this witness with a view of impeaching him were inadmissible. Most of them seem to have been designed to bring out the fact that in a criminal complaint made by the witness against one Espinoza he had sworn that the cow in question was the property of Avila. But the witness had not testified otherwise in this case. The evidence was clearly inadmissible. The court did not err in striking out the testimony of Silvers as to declarations of Avila. Avila had not been questioned as to such declaration. The same statement was afterward repeated by the witness without objection on the part of the prosecution. The question of the prosecution to the same witness, objected to by defendant, was not improper in cross-examination, and the answer could not possibly have affected the result one way or the other. I advise that the judgment be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

## BANK OF UKIAH v. REED et al.*

S. F. No. 1542; December 14, 1900.

63 Pac. 68.

**Default—Where There is a Conflict of Evidence Submitted on a Motion** to set aside a default, the determination of the court denying the motion will not be reviewed on appeal.

**Default.—Where a Written Memorandum of an Agreement** between the parties to a suit is executed, in which is expressed the consent of defendants that their defaults be entered, and an agreement on the part of plaintiff not to take judgment until a certain time, the burden of proof is on defendants to show that they were entitled to a further notice, and to additional time beyond the date expressed in the memorandum, before judgment could properly be entered against them by default.

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by the Bank of Ukiah against John S. Reed and others. From an order denying a motion to vacate and set aside their default and the judgment thereon, defendants appeal. Affirmed.

Heller & Powers for appellants; J. A. Cooper for respondent.

HARRISON, J.—After judgment had been entered against the appellants upon their default, they moved the court to vacate and set aside their default and the judgment thereon, and from the order refusing their motion the present appeal has been taken. The complaint was filed January 21, 1896, and, service of the summons issued thereon having been had upon the defendant, John S. Reed, a demurrer to the complaint was filed on his behalf February 1, 1896. Service was made upon the defendant Anna M. Reed March 11, 1896. On that day, at the request of the defendants, an interview was had between them and the directors of the plaintiff, at the banking house of the latter, at which it was agreed on the part of the defendants that the demurrer of the defendant

*Rehearing denied January 12, 1901.

John S. Reed should be withdrawn, and that Mrs. Reed should make default in the suit, and that upon payment by the defendants of $600, on or before July 15, 1896, the plaintiff would not take judgment until January 2, 1897. Mrs. Reed thereupon appeared in the action, and filed her consent that default be taken against her. A stipulation was also filed by John S. Reed consenting that his demurrer be withdrawn and his default entered. April 27, 1896, the plaintiff caused the defaults of the defendants to be entered. The defendants did not pay the $600, and on September 18, 1897, judgment was entered in the action for the foreclosure and sale of the mortgaged property. September 29, 1897, the defendants moved to set aside and vacate the default and judgment, upon the ground that they were entered through mistake and inadvertence on their part, and presented evidence in support of their motion. The court, after hearing the same, denied the motion, and the present appeal is taken from that order.

In the affidavits presented by the defendants in support of their motion they set forth, as the grounds upon which they claim the relief, that at the time they agreed to withdraw the demurrer, and consented that default might be entered against them, the attorney for the plaintiff agreed with them that no further action should be taken in the case without giving them previous notice thereof; and, further, that after said agreement had been made, the president of the plaintiff agreed with them, in substance, that no judgment should be taken against them until after the year 1897, and that they might have the whole of that year in which to pay their indebtedness, and that their failure to appear or take any steps in the suit had been by reason of their reliance upon these agreements. At the hearing upon the motion there was presented on behalf of the plaintiff a written memorandum, in which was expressed the consent of the defendants that their defaults be entered, and the agreement on the part of the plaintiff not to take judgment until January 2, 1897. It was also shown that at the interview between the defendants and the directors, at which the agreement was made, its terms were openly stated and discussed, and that, after the memorandum had been prepared, it was read to the defendants, and its terms assented to by them, and that a copy of it was taken by Mrs. Reed. Affidavits by directors who were

present at the meeting were also presented, in which they stated that no agreement was made of any extensions of time, except as stated in said memorandum, and that nothing was said at the meeting about giving further notice of any steps to take judgment. The attorney for the plaintiff was also present at that interview, and testified at the hearing of this motion that neither at that time, nor at any other time, did he agree to any extension of time beyond the second day of January, 1897, or to give to the defendants any notice of any further steps to be taken in the suit. The president of the bank testified that he never told the defendants, or either of them, that they could have all of the year 1897 in which to pay their indebtedness, or agreed with them, or either of them, to give to them any time beyond that expressed in the memorandum. Upon the conflict of evidence thus presented, it must be assumed that in denying the defendants' motion the superior court determined in favor of the plaintiff. In the face of the evidence contained in the written memorandum the burden was upon the defendants to show that they were entitled to any further notice before the entry of judgment, as well as to additional time beyond the second day of January, 1897, before judgment should be entered against them. We cannot say, from an examination of the evidence presented to the superior court, that its determination was erroneous, or that it abused its discretion in denying the motion of the defendants. The order is affirmed.

We concur: Garoutte, J.; Van Dyke, J.

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## RICHARDSON et al. v. CHICAGO PACKING AND PROVISION COMPANY et al.*

S. F. No. 1689; December 19, 1900.

63 Pac. 74.

**Corporation—Unpaid Subscriptions.**—**A Judgment Creditor of a Corporation Sued** to enforce unpaid balances on stock subscriptions of fifteen stockholders. One of the defendants was also a

*For subsequent opinion in bank, see 135 Cal. 311, 67 Pac. 769.

judgment creditor of the corporation, but the action was dismissed as to him, and he became plaintiff by the court's order. The corporation owed no other debts. The original plaintiff's claim was paid by the fourteen remaining defendants, under a stipulation in which none of the other plaintiff's rights were relinquished, and the court gave the fourteen defendants a several judgment against such plaintiff by way of contribution, ignoring the fact that he was also a creditor of the corporation. Held, that such plaintiff was entitled to have the amount of his proportionate liability to the corporation on both claims deducted from his own claim, and the balance due him apportioned against the fourteen defendants.

**Corporation—Unpaid Subscriptions.—Where a Creditor has the Right to be Subrogated** to the rights of a corporation to claim unpaid balances due on shares, he does not lose that right by reason of the fact that he is a stockholder.[1]

**Attorneys.—Where Plaintiff's Attorney Entered into a Stipulation** with defendants solely on behalf of a coplaintiff, reserving all plaintiff's rights, the fact that the attorney was also attorney for plaintiff did not render the agreement binding on plaintiff.

**Corporation—Enforcement of Subscriptions.—Where a Subscriber** for corporate stock sought to enforce subscriptions made under the same circumstances as his own, he could not repudiate his liability thereon under Civil Code, section 359, providing that no corporation shall issue stock except for money paid, labor done or property received.

**Corporation.—Where Stockholders Agreed That Shares Should be Deemed** fully paid by payment of a stated amount less than the par value, a creditor, who was also a stockholder, could not compel the payment of the par value of shares owned by other stockholders, the creditor being a party to the agreement.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Thomas Richardson and V. L. Fortin against the Chicago Packing and Provision Company and others. From a judgment for defendants and from an order denying a new trial plaintiff Fortin appeals. Reversed.

Wm. H. Jordan (H. M. Barstow of counsel) for appellant; Edw. C. Robinson, B. McFadden and Fitzgerald & Abbott for respondents.

PER CURIAM.—Action to recover from the stockholders of defendant corporation the unpaid balance of their subscrip-

[1] Cited in the note in 99 Am. St. Rep. 505, on the right to subrogation.

tions. Defendants had judgment, from which, and from an order denying his motion for new trial, plaintiff V. L. Fortin appeals.

The action was originally brought by plaintiff Richardson, as a judgment creditor of defendant corporation, against seventeen defendants, among them Fortin; but the action was dismissed as to him, and he became, by order of the court, a coplaintiff. Judgment was afterward entered by stipulation in favor of Richardson against the defendants severally excepting Lieb and Buttenbach (as to whom the action had been dismissed), and Fortin became the sole plaintiff, whose complaint was similar to that of Richardson. After Fortin had filed his complaint as coplaintiff, the defendants obtained leave of court to file, and did file, a cross-bill with the object of bringing in some forty-one parties as codefendants, who, it was alleged, were subscribers to the capital stock of defendant corporation, but had not been made defendants at the commencement of the action. The prayer of this cross-complaint was that the persons named therein as codefendants "be compelled to pay to these defendants filing this cross-complaint, by way of contribution, such proportion of any judgment or judgments in favor of said Thomas Richardson or said V. L. Fortin which have been or may be recovered in this action as may be just and equitable in the action," and for further relief, etc. This cross-complaint was served on thirty-odd of such new parties, three of whom defaulted; the others answered severally. Fortin's complaint was answered by the original defendants, but the cross-bill of the fourteen defendants was not served on Fortin, nor was it answered by him.

The court found the number of shares subscribed by each of the fourteen original defendants (the action having been dismissed as to defendants Fortin, Lieb and Buttenbach); that said defendants had subscribed to the stock with the agreement among all the said original seventeen, including Fortin, with the corporation, that each of them should be liable to pay $50 per share, and no more, on shares of the par value of $100, and that said subscribed shares should be deemed fully paid up when said $50 per share had been paid thereon; that said agreement was well known to Fortin at the time he became a creditor of the corporation for the goods and merchandise and labor, the subject of his action, and that

Fortin was himself a subscriber to fifty shares of said stock under said agreement; that there were seven original corporators and promoters of the corporation, who are among the said fourteen defendants, and were the directors and the only subscribers at that time; and "it was then unanimously agreed between and among themselves that it was for the best interests of the corporation to sell and dispose of the first half of the capital stock, to wit, 2,500 shares, at the price of $50 per share, for the purpose of raising working capital to start and carry on the business of the corporation"; and it was likewise so agreed that the said seven original corporators should be required to pay $50 per share on their subscribed stock, and no more, and that, such payment being made, their shares should be deemed fully paid up, "and that all persons who should thereafter subscribe for said capital stock, until one-half thereof should be taken, should be required to pay the same price, to wit, $50 per share, and no more"; and it is found that Fortin had knowledge of this agreement when he became creditor of the corporation; that subscription books were opened by the said seven directors (they being then the only subscribers), in which books such limitation of liability was stated, and all subscriptions to stock thereafter made by said fourteen defendants and all others "were made in said books upon said terms"; that "said agreement among and by said directors was not evidenced by any form of resolution of the board of directors or the stockholders theretofore or at that time passed or entered in the records of the corporation, but was unanimously agreed to by said seven directors and only stockholders, and on March 26, 1888, was ratified by resolution duly passed by the board of directors and entered upon the minutes of said board of directors"; that Fortin subscribed to fifty shares of said stock on February 9, 1888, upon the same terms as did the defendants; that all these agreements and the said subscriptions of stock thereunder "were each and all made openly and in good faith, and for the purpose of raising money to fairly launch a new and struggling enterprise, and not for the purpose of defrauding the corporation or its stockholders or creditors"; that $50 per share was the full value of said stock, and all that the subscribers were willing to subscribe therefor or become liable thereon; that all the subscribers to stock, of whom there were many besides the said fourteen defendants and

said plaintiff Fortin, received their stock under this agreement, and said Fortin "had full notice and knowledge of that fact before he sold and delivered, or agreed to sell or deliver, any part of the goods . . . . for which he is seeking to recover in this action." The court then finds the sums subscribed by each of the fourteen defendants and the amount each has paid thereon, and that Fortin has paid nothing on the fifty shares subscribed for by him; that the last meeting of the board was held April 4, 1888, since which time "it has ceased to meet and has not discharged any of the duties of a board of directors of said corporation; that on or about the —— day of May, 1888, the defendant corporation ceased to exercise its corporate franchise, and then or thereabouts abandoned its corporate franchise, and ever since has failed and ceased to act as a corporation; that said corporation has no property or assets save and except its equitable asset represented by the unpaid subscriptions of the various subscribers to its capital stock, and has and had, at the time this action was commenced, no creditors save and except Thomas Richardson and V. L. Fortin, the plaintiffs herein." The court found that the judgment entered in favor of plaintiff Richardson was for $6,074.60, in pursuance of a stipulation entered into by said fourteen defendants, and each was to pay, and did pay, his pro rata share thereof; and that said fourteen defendants were indebted to the corporation for subscriptions to its stock the sum of $7,250, and no more; that they paid upon their subscriptions $7,275, including said Richardson judgment, in paying which some subscribers paid slightly more than their proportion, and others paid slightly less, the total overpayments being $100, and the underpayments $75.40, and that said defendants are indebted to the corporation for this latter amount, and no more. The court found that Fortin was indebted to the corporation for the unpaid subscription for fifty shares of stock, or $2,500, and that the judgment held by him against the corporation for which he sued was $6,514, entered on September 24, 1888, with interest at seven per cent from that date; that he realized thereon, through an execution duly issued, and sale of certain property of the corporation, a certain sum, leaving still due a deficiency of $4,992.50, which was docketed November 28, 1888, and is still unsatisfied.

As conclusions of law the court found, in effect, that the said fourteen defendants were liable to the corporation only for any unpaid balance of $50 on each share subscribed for by them respectively; that, as Fortin had knowledge of the agreements herein stated before he sold or delivered the goods sued for, he has no greater rights against said defendants than against the corporation itself, and that Fortin is equally bound by said $50 per share agreements, and can exact no more than $50 per share on defendants' subscriptions; that the unpaid balance thereof is $75.40, and no more; that Fortin, "being an unpaid subscriber at the time these fourteen defendants paid the Richardson judgment, is liable to said fourteen defendants, by way of contribution, for his just proportion of said Richardson judgment, . . . . and his proportion is $1,482, with interest . . . .; making . . . . $1,793.82." Decree was accordingly entered in favor of the fourteen defendants severally against Fortin in sums varying according to their respective payments on the Richardson judgment. The stipulation to pay Richardson was signed by counsel for the fourteen defendants, and at the time the attorney of Richardson was the attorney of Fortin, and it was stipulated that the Richardson "judgment shall in no respect affect the right of plaintiff V. L. Fortin to judgment, and shall not be an adjudication of any point or matter either against or in favor of said V. L. Fortin." The court made no findings as to the thirty-odd new defendants, who were made parties to the action by the cross-complaint of the fourteen original defendants. Appellant contends that the decision is against law in the following particulars: (1) In failing to determine the issues arising upon the cross-complaint of the fourteen original defendants, and the answers thereto; (2) in adjudging Fortin indebted to these fourteen defendants by virtue of his stock subscription; (3) in failing to adjudge Fortin entitled to recover the sum found due him on his judgment against the corporation; and (4) in deciding that the sum of $50 per share constituted the entire subscription liability of each defendant.

1. Assuming the validity of the agreement under which the stock was issued, and that it was binding on the stockholders who received shares under it, as between themselves, and that upon payment of fifty per cent by a stockholder his

liability to the corporation was fully discharged, did the payment to Richardson have the effect found by the court? Richardson and Fortin were both creditors, the latter being also a stockholder. The findings show that the total indebtedness of the corporation was made up of the two judgments held by Richardson and Fortin, respectively; the total debt was the sum of these two judgments; the fourteen defendants and plaintiff Fortin, as stockholders, were respectively liable to the corporation to the extent of any unpaid balance of their stock, and the creditors were entitled to be subrogated to the rights of the corporation. But the court treated the payment of Richardson's judgment by the fourteen defendants not only as discharging them from liability to Fortin as a creditor, but as giving them a right to a several judgment against Fortin by way of contribution, entirely ignoring the fact that Fortin was a creditor of, as well as debtor to, the corporation. Fortin could not complain if he had agreed that these defendants might pay Richardson in full, and thus discharge their liability to the corporation. The stipulation, however, under which the fourteen defendants paid the Richardson judgment expressly reserved to Fortin all rights in the pending action, and under that stipulation these defendants could not deprive Fortin of his right to contribution as a stockholder or his right as a creditor of the corporation. When the fourteen defendants paid Richardson, it was subject to an equitable adjustment of their and Fortin's rights as stockholders and Fortin's rights as a creditor, as shown by the pleadings and evidence. Simply stated: The fourteen defendants and Fortin were liable for the two judgments sued upon, within the limit of $50 per share, to the extent of the unpaid balance of their subscribed stock. A judgment could not be entered against Fortin in his own favor, as he was plaintiff; but the proportionate amount due from him on both claims sued upon should have been deducted from the amount due him on his judgment, and he should have had a several judgment against each of the fourteen defendants for his proportionate share of the indebtedness of the corporation to him. In other words, Fortin should be treated as both creditor and debtor, and in arriving at what should be paid him there should be first deducted from his claim the amount of his proportionate liability to the corporation on both claims, and the balance should be apportioned among

the said fourteen defendants, and judgment entered accordingly. The right of the creditors to be subrogated to the corporation to the extent of claiming any unpaid balance due from the stockholder to the corporation is too well settled to require any citation of authorities, and a creditor does not lose this right by being a stockholder. He may be postponed to other creditors not stockholders, but the principle does not apply here, as the only other creditor was fully paid. This principle admitted, it seems to us too plain to require argument that the trial court erred in ignoring Fortin's relation as a creditor. If the fourteen original defendants chose voluntarily to pay Richardson, stipulating that Fortin's rights should be unaffected thereby, we do not see upon what principle Fortin can be made to suffer. The claim that Fortin is estopped because his attorney was Richardson's attorney is not tenable. The attorney did not stipulate for Fortin, and, besides, if he had, Fortin was fully protected by the terms of the stipulation. It was held in Welch v. Sargent, 127 Cal. 72, 59 Pac. 319, that when the corporation is insolvent (as is the case here) the creditors cannot take upon themselves the authority of the corporation, and pay the subscription to one creditor to the injury of the other creditors. This was, in effect, what these fourteen defendants did. They undertook to relieve themselves by paying their entire subscription to one creditor—Richardson—wholly disregarding the rights of the remaining creditor, Fortin.

2. In the cross-bill filed with the answers of the fourteen original defendants certain thirty-odd other stockholders were brought into the action, and most of them were served, and appeared by answer; and it was alleged in the cross-bill that they were solvent, and able to contribute their share of any judgment rendered. This cross-bill was not served on Fortin, the coplaintiff, nor was it answered by him. But he claims that the parties were before the court, and the issues presented by their pleadings were there also; and that, as the avowed object of the pleadings was to have an adjudication of the liability of these new parties, and to compel them to bear their just proportion of any relief to which the original complainant should be found to be entitled, the court should have found upon these issues. The fourteen defendants having, as they supposed, fully discharged their liability by paying Richardson (in which they each paid substantially fifty per

cent of their corporate liability), and the court having so regarded their payment, it became a matter of indifference to them, and apparently so to the court, what was done with these new parties; and the trial court therefore cut the case in the middle at this point, and made no findings as to them, thus in effect increasing the burden of the original fourteen defendants and Fortin also. These fourteen defendants do not appeal, and cannot complain; but Fortin complains, and now insists that he should have had the benefit of findings, and, if these additional parties were in fact stockholders, and still owed the corporation as subscribers to its stock, they should have been made to share his burden. The question need not be decided, since the case must be remanded, and plaintiff Fortin can, if he wishes, easily remove all question by an appropriate pleading, or by obtaining the proper order of the court.

3. Appellant makes the point that, as the court found that he has never paid anything to the corporation for his shares, the stock was, therefore, void, and he was not liable thereon. Appellant relies on section 359 of the Civil Code, which provides that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received." The court did not find that Fortin was to receive these shares as a gratuity. It found that he, as did all other stockholders, subscribed for certain shares, and agreed to pay therefor $50 per share, but had not paid. He became creditor of the corporation beyond the amount he owed it as a subscriber, about the time he subscribed, and it may have been for this reason that he was not called upon to pay at the time he subscribed, or at all. Whatever the reason was, he entered into the agreement with his fellow-stockholders, and he furnished merchandise and labor to the corporation with knowledge of the agreement, and became indebted to the corporation for his shares as the others did. Under the circumstances he cannot be heard to question his liability as one of the original promoters of the enterprise which the corporation was formed to carry out. Fortin is in the same position as the stockholders whom he sues. They had not paid, nor had he. To obtain a judgment against them, he assumes that they are liable on their subscriptions, but for his subscription, made under the same circumstances as theirs, he is not liable. If the position be sound, he is "hoist with his own petard,"

and they, too, must escape liability. But we do not decide how far a promise to pay in the future for shares delivered will be regarded as "money paid, labor done, or property actually received." Respondents contend, and with reason, that a promise to pay may be enforced, and is property; that, for example, a promissory note given in good faith by a solvent subscriber in payment of his subscription is "property actually received." The question does not necessarily arise. Appellant is in no position to repudiate his obligation to the corporation. The law on the point, as upon other questions in this case, will be found in a learned note to Thompson v. Bank, 3 Am. St. Rep. 797.

4. It is not necessary to pass upon the motion to dismiss the appeal from the judgment. The errors complained of are reviewable on the appeal from the order, and hence the alleged defective appeal from the judgment is immaterial. Nor is it necessary to decide whether an agreement may be made among all the stockholders that the shares shall be deemed fully paid by payment of an agreed amount less than the par value. Such an agreement has been held to be good among the stockholders under circumstances when not conclusive as to creditors: See Thompson v. Bank, supra, note. Appellant, as a stockholder, was party to the agreement in the present case, and cannot avoid its consequences as a creditor. The judgment and order are reversed and the cause remanded for a new trial.

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## PEOPLE ex rel. SILVA v. LEVEE DIST. NO. 6 OF SUTTER COUNTY et al.*

Sac. No. 687; December 20, 1900.

63 Pac. 342.

**A Levee District was Organized Under Act of March 25, 1868** (Stats. 1867–68, p. 316), providing a method for the organization of such districts, and, such act being declared void as to the method of organization, the legislature, by act of March 30, 1872 (Stats. 1871–72, p. 734), recognized the existence of such district. Held, that such

*For subsequent opinion in bank, see 131 Cal. 30, 63 Pac. 676.

legislative recognition gave legal existence to such district, though it was irregularly created, since the legislature, having power to create such districts, on the law under which it was created being held invalid could give it legal existence by positive recognition.

**Levee District.**—Act of March 31, 1891 (Stats. 1891, p. 235), providing a new form of government for a certain levee district, is not violative of constitution, article 11, section 6, and article 12, section 1, declaring that neither municipal nor private corporations shall be created by special laws, since such levee districts are neither municipal nor private corporations, but are mere governmental agencies having certain of the attributes and functions of corporations.

**Levee District.**—Act of March 31, 1891 (Stats. 1891, p. 235), providing a new form of government for a levee district, does not contravene constitution, article 4, section 25, subdivision 3, forbidding the enactment of local or special laws if a general law can be made applicable, since it was a question for the legislature whether a general law was applicable, and its determination of the necessity for a special law will not be interfered with.

APPEAL from Superior Court, Sutter County; E. A. Davis, Judge.

Quo warranto, on the relation of John F. Silva, against levee district No. 6 of Sutter county and others. Judgment for defendants, and relator appeals. Affirmed.

Attorney General Ford, Hart & Aram and Kirby S. Mahon for appellant; W. H. Carlin and M. E. Sanborn for respondents.

HENSHAW, J.—This is a proceeding in quo warranto to test the legal existence of levee district No. 6. The other defendants are the officers of the district. The case was heard and determined upon an agreed statement of facts, which are the findings in the case. Upon these facts judgment was rendered for defendants, and plaintiff appeals.

Levee district No. 6 was organized under the act of March 25, 1868 (Stats. 1867–68, p. 316). By virtue of that act levee district No. 1 was created, and there was provided a scheme for the organization and government of other levee districts which might thereafter be formed. But section 21 of the act, setting forth the method of organization for such districts, has been declared unconstitutional and void: Moulton v. Parks, 64 Cal. 183, 30 Pac. 613; Brandenstein v. Hoke, 101 Cal. 134, 35 Pac. 562. It follows, therefore, and is con-

ceded, that the organization of levee district No. 6, effected under section 21 of the act of March 25, 1868, was irregular and void. Notwithstanding this fatal irregularity in its organization, the legislature made distinct recognition of the existence of the district by an act approved March 30, 1872 (Stats. 1871–72, p. 734), and again by acts approved March 31, 1891 (Stats. 1891, p. 235, and Stats. 1891, p. 237). The first of these acts of recognition was passed under the constitution of 1849, and the latter two under the present constitution. That they are positive acts of recognition sufficient to invest the district with the functions and attributes which it had assumed to exercise under the law of 1868 may not be doubted, under the authority of People v. Reclamation Dist. No. 108, 53 Cal. 346, and Reclamation Dist. No. 108 v. Gray, 95 Cal. 605, 30 Pac. 779, unless it can be said that the legislature itself was without power so to validate the existence of a levee district thus irregularly organized. This is the contention of appellant. But legislative action in such matters is only circumscribed by the express limitations of the constitution. It is not questioned but that in the first instance, by direct enactment, the legislature could have carved out levee district No. 6 precisely as it did in the case of levee district No. 1. Where the exercise of a particular power is limited by the constitution, the legislature must act in the mode prescribed. But, where there is no such limitation, if the legislature shall prescribe a mode for its exercise which is, perchance, illegal, it may by subsequent ratification or recognition validate the acts done under the irregular mode. To illustrate, the present constitution forbids the creation of corporations for municipal purposes, except by general law. A special law creating a special municipal corporation would be violative of this constitutional inhibition, and no subsequent act of ratification or recognition by the legislature could validate that which in the first instance it had no power to do. But under the constitution of 1849 corporations for municipal purposes could be created by special law. If, then, the legislature, acting under that constitution, should so by special law create a municipal corporation, and for some reason the law lacked validity, the legislature, having the power thus to create the corporation, could by ratification or recognition of its corporate existence erect it into a valid municipality. If, then, levee district No. 6 be considered as

a corporation (a matter inviting later attention), it was a corporation created for municipal purposes, and, notwithstanding this irregularity of its creation, the legislature could, as it did, give it a legal existence by its positive acts of recognition.

But appellant still further contends that levee district No. 6 was a corporation for municipal purposes under the act of 1868 and the act of 1872 recognizing its existence; that a new and distinct organization was perfected for it under the act of March 31, 1891, passed under the present constitution; that the district elected to come under this act, and to exercise the corporate functions provided for by the act; that the act itself is void; and that therefore the district is improperly exercising corporate functions, from using which it should be restrained. Since levee district No. 6 was a legal entity before the passage of the act of March, 1891, if that act be itself void it would not interfere with the legal existence of levee district No. 6; and the utmost which the court could do would be to require it to exercise the powers which it had theretofore enjoyed under the act of 1868, and the acts amendatory thereto, and restrain it from exercising any new rights or powers under the act of 1891. But, upon the other hand, respondent insists upon the validity of the act of 1891, and upon its right to exercise the powers conferred upon it by that act, and thus a further consideration of the question is demanded.

Appellant's argument against the validity of the act of March 31, 1891, is that levee district No. 6 is a corporation for municipal purposes; that, under the constitution, corporations for municipal purposes shall not be created by special laws; and that the act of March 31, 1891, dealing as it does with levee district No. 6 alone, and providing a new form of government for it, is a special law. Article 12, section 1, of the constitution, having reference to private corporations, provides that they may be formed under general laws, but shall not be created by a special act. Article 11, section 6, of the constitution declares that corporations for municipal purposes shall not be created by special laws. The act of 1891 is unquestionably a special law. If levee district No. 6 be a corporation, it is certainly not a private corporation, and must come under the designation of article 11, section 6—"a corporation for municipal purposes." And if it be a

corporation for municipal purposes, within the meaning of that article and section, then, indubitably, the act of March, 1891, forcing upon a levee district a new, distinct and different organization, is special and inhibited legislation. But is levee district No. 6 a corporation for municipal purposes, within the meaning of the constitution, or is levee district No. 6, in strictness, a corporation at all? Expressions will be found in the cases where such organizations have been designated "corporations for municipal purposes," or "public corporations," or "corporations for public purposes," but these were convenient phrases of designation and description, rather than judicial declarations as to the nature and character of these agencies. The first question propounded is conclusively answered by People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016. It is there held that a reclamation district, conceding it to be a corporation, is not a corporation for municipal purposes within the meaning of the constitution. But, as such levee districts or reclamation districts are distinctly not private corporations, it must follow that, if they be corporations, they are corporations in a class by themselves; and the general powers of the legislature for their creation, organization and control are in no wise limited by the constitution of the state. The second question is likewise answered in People v. Reclamation Dist No. 551. This court there said, speaking through Mr. Justice Temple: "These districts, in my opinion, belong to neither of these classes [public or private corporations]. They are special organizations, formed to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. They are described by Dillon in his work on Municipal Corporations (sections 24–26). He calls them quasi corporations. Perhaps it would have been more accurate to say that they are not corporations at all, but are so classed because many of the presumptions and rules which apply to corporations have been made applicable to them. They are public agencies, which would cease to exist when the policy of the state has changed so that they are no longer required, or when there is no further function for them to perform. And there is nothing in the constitution relating to municipal corporations which would prevent the state from so changing its policy as to put them

out of existence." We think that what was thus tentatively expressed in the above quotation is a strict and accurate definition of the character of these organizations. The designation of them by Dillon as quasi corporations is, in itself, a distinct denial that they are corporations. They are governmental agencies—mere mandatories—having certain of the attributes and functions of a corporation, but, in strictness, not corporations at all. They are created to perform certain work for lands districted, for the benefits to be received. Their work accomplished, they cease to exist. They have grown up out of our new conditions and progressive civilization. It is concluded, therefore, upon this point, that levee district No. 6 is not a corporation, and that the constitutional inhibition against creating corporations, private or municipal, by a special law, has no applicability. Nor can it be perceived how the act of 1891 contravenes the provisions of article 4, section 25, subdivision 3, which forbids the legislature to pass local or special laws in cases where the general law can be made applicable. We would not overthrow the act of a co-ordinate branch of the government under this provision unless it clearly appears that a general law could be made applicable. Considering the nature and duties of such districts, it might well be that, for the proper performance of their work, the powers to be conferred or duties imposed upon one would have no value if imposed upon another, or, if imposed upon all, might work injury to the many, while conferring benefits upon the few. It is a case, as was that of People v. McFadden, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851, where the legislative determination of the necessity for a special law will not here be interfered with. The judgment appealed from is therefore affirmed.

We concur: Temple, J.; McFarland, J.

## GIBBS v. TALLY et al.*

L. A. No. 746; December 22, 1900.

63 Pac. 168.

**Mechanic's Lien—Bond.—Under Code of Civil Procedure,** section 1203, requiring a bond, in case of a building contract, it by its terms to inure to the benefit of persons performing labor and furnishing materials for the contractor, one given to "T. [the owner], legal representatives or assignees," and not in terms inuring to the benefit of anyone else, is insufficient.

**Mechanic's Lien—Failure to Take Bond.—Under Code of Civil Procedure,** section 1203, requiring a bond, in case of a building contract, in an amount equal to at least twenty-five per cent of the contract price, inuring to the benefit of persons performing labor and furnishing materials for the contractor, and providing as limit of damages, in case of a bond, the value of labor and materials furnished, not exceeding the amount of the bond, and declaring that any failure to comply with the provisions of the section shall render the owner and contractor liable to materialmen and laborers entitled to liens on the property, the measure of damages, in the absence of a bond, is the amount of the claim for labor or material, not exceeding twenty-five per cent of the contract price.

**Mechanic's Lien—Failure to Take Bond.—Under Code of Civil Procedure,** section 1203, giving action for damages "to any and all materialmen, laborers and subcontractors entitled to a lien," if bond is not filed where there is a building contract, the claimant who sues first and obtains judgment is entitled to recover up to the limit of the owner's liability, unless other claimants intervene, or, having brought actions, have them consolidated with his.

**Mechanic's Lien—Failure to Take Bond.**—Though a materialman, suing the owner of a building for failure to have a bond of the contractor filed, alleges nonpayment of the claim for materials furnished, it is enough for him to prove the debt, and defendant has the burden of proving payment.

**Mechanic's Lien—Failure to Take Bond.—Under Code of Civil Procedure,** section 1203, giving action for damages to a laborer or materialman against the owner of the property who, in case of a contract to build thereon, does not take a bond for their benefit, and providing that action on the bond, if one is taken, shall not affect the laborer's lien nor any action to foreclose it, except that there shall be but one satisfaction of the claim, action for failure to

*For subsequent opinion in bank, see 133 Cal. 373, 60 L. R. A. 815, 65 Pac. 970.

take bond is not affected by the bringing of an action to foreclose the lien.[1]

**Mechanic's Lien—Failure to Take Bond.**—A claim under Code of Civil Procedure, section 1203, for damages by a laborer against the owner of property who, in case of contract to build thereon, does not take a bond from the contractor, is within Civil Code, section 1458, declaring "a right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such."

APPEAL from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by William H. Gibbs against Mary A. Tally and another. Judgment for plaintiff. Defendants appeal. Modified and affirmed.

Clarence A. Miller for appellants; T. M. Stewart for respondent.

CHIPMAN, C.—Action to recover damages from the owner of a building for failure to comply with section 1203 of the Code of Civil Procedure relating to liens of mechanics and others. Plaintiff had judgment, from which defendants appeal on the judgment-roll, including a short bill of exceptions.

1. Appellants challenge the constitutionality of the above section of the code. The question has been recently decided here adversely to appellants' contention: Carpenter v. Furrey, 128 Cal. 665, 61 Pac. 369.

2. Appellants contend that a sufficient bond was filed. A bond did in fact accompany the contract, and was filed with it. This bond was signed by the contractor, Parsons, and by two sureties, but it was given to the owner of the property being improved, "Mrs. Mary A. Tally, legal representatives or assigns," and was "not by its terms made to inure to the benefit of any and all persons who perform labor or furnish materials to the contractor, or any person acting for him or by his authority," as the statute requires. The bond was not such a one as the law prescribes, and was not available to anyone except the owner, to whom it was given, and the

[1] Cited and approved in Erickson v. Russ (N. D.), 129 N. W. 1026, in support of the statement: "Neither is the lien waived nor merged upon the obtaining of a judgment at law upon the debt. Until the lienor has realized upon said judgment or parted with the ownership thereof, it does not act to destroy his lien."

result, so far as any laborer or materialman is concerned, was the same as if no bond at all had been filed. Under section 1203, as it stood when first enacted (Stats. 1885, p. 147), the bond would have been available to laborers and materialmen as well as to the owner, but the section was repealed by act of March 15, 1887 (Stats. 1887, p. 152), and there was no provision of the code on the subject until the new section was enacted in 1893 as we now have it (Stats. 1893, p. 202). Plaintiff could not sue the sureties on this bond, for they are liable only so far as they are bound by the terms of the bond, and the bond does not make them liable to anyone but the owner, her representatives and assigns. It must follow that there was no such bond as is required by the code.

3. It is claimed that, if it be conceded that the bond does not comply with the statute, the action cannot be maintained because of the uncertainty as to what is the measure of damages in such a case. When a bond is filed, the section provides that "any person shall have an action to recover upon said bond, against the principal and sureties, or either of them, for the value of such labor or materials, or both, not exceeding the amount of the bond," etc. After providing as to filing a bond and its terms, etc., the statute reads as follows: "Any failure to comply with the provisions of this section shall render the owner and contractor jointly and severally liable in damages to any and all materialmen, laborers and subcontractors entitled to liens upon the property affected by said contract."

The statute is plain enough as to the limit of damages where a bond is filed, but is not so plain where it is not filed. It is manifest, however, that the legislature intended that some damages should be recoverable, and the only question is, How much? It would seem reasonable that the damages should not exceed what would be allowed on the bond if filed, namely, twenty-five per cent of the contract price, and to this extent, at least, we think the section will sustain the action. The judgment was less than twenty-five per cent of the contract price. But appellants claim that it appeared from the findings that there were unpaid claims other than those set forth in plaintiff's complaint, and that it was error to give judgment for plaintiff without prorating with the other claimants. The statute gives the action "to any and

all materialmen, laborers and subcontractors entitled to liens." Plaintiff was not bound to bring the action for the benefit of all unpaid claimants. The right of action is several, and the claimant who first sues and obtains judgment is entitled to recover up to the limit of the owner's liability. Possibly other unpaid claimants might intervene and ask to share in the recovery, where the unpaid claims exceed the amount for which the owner is liable. Possibly, too, where several different actions have been begun against the owner under section 1203, these actions might be consolidated in order to give to each claimant his proportionate share of the amount for which the owner is liable. But in the absence of any such situation, brought about by other unpaid lienholders, we see no reason why plaintiff should suffer any diminution of his judgment.

4. Finding 8 is to the effect that Parsons, the contractor, has not paid any part of the judgments mentioned in the complaint, nor any of the claims sued on, and that no part of either of said claims has been paid. Appellants challenge this finding as unsupported by the evidence. Plaintiff sues as assignee of seven different claims of as many different claimants, whose liens had been foreclosed and had gone to judgment, and also on a claim personal to himself, which had also gone to judgment. As to each of these claims plaintiff alleged that the contractor, Parsons, "has not, nor has any other person, paid any part of said judgment," except a certain sum stated in the complaint in each instance. The answer denies nonpayment, and alleges payment in full of each and all said claims. The only evidence of nonpayment was the testimony of Parsons, the contractor, who testified that he had not paid any of the claims, and that he had no property out of which payment could have been made, and that he cannot now pay any of the claims. Appellants contend that the burden of proof was on plaintiff to prove nonpayment. Even if that were the law, as has been intimated in a few cases, a sufficient prima facie case of nonpayment was shown. But in Melone v. Ruffino, 129 Cal. 514, 79 Am. St. Rep. 127, 63 Pac. 93, this court reviewed the authorities in this state on the subject, and showed that the rule here is the same as at common law, and that, "where a plaintiff has proved the existence of a debt—at least, within the period of statutory limitation—the burden of proving payment is

on the defendant"; and that, although an averment of non-payment is necessary to make the complaint perfect, yet "a negative allegation is to be proved only when it constitutes a part of the original substantive cause of action upon which the plaintiff relies"—as in cases, for instance, of malicious prosecution, and where the cause of action is the alleged failure of the defendant to do work in a workmanlike manner.

5. Appellants contend that the several claims set out in the complaint were merged in the judgment against the contractor, Parsons, in the suit for the foreclosure of the liens, and that, the lienholders having elected to obtain and accept judgment against him for their claims, they are bound by their election. The pursuit of the remedy of foreclosure given by the statute, in which a money judgment may be taken against the contractor, and a judgment of foreclosure against the owner, will not operate as an extinguishment by merger of the remedy or right of action given under section 1203. It is expressly provided in the section that the action on the bond referred to "shall not affect his [the laborer's] lien nor any action to foreclose the same, except that there shall be but one satisfaction of his claim," etc. We think the converse would be true, that the action for a failure to comply with the section is not affected by bringing the action to foreclose.

6. The judgment includes five assigned claims which were embraced in the foreclosure suit, and it is now contended that they are not assignable, and should not have been included in the judgment. Section 1203, supra, creates an obligation to enforce which is the purpose of this action. It is such an obligation as is assignable under section 954 of the Civil Code. "A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such": Civ. Code, sec. 1458.

7. Among the claims on which plaintiff sued as assignee was that of one Ware, a subcontractor, for $182.65; and another of the Los Angeles Lime Company, for $30.50, for supplies furnished to said Ware as subcontractor. Plaintiff failed to prove an assignment of the lime company's claim. It appeared that the lime company furnished the material constituting its claim to Ware, and his claim when assigned to plaintiff, and as it figured in the judgment in this action, included the lime company's claim. It is true, as contended

by plaintiff, that Ware's claim as subcontractor is distinct from the lime company's claim as a materialman, and under some circumstances Ware's claim might be considered independent of the lime company's claim, and judgment be given for it, while defendants would still be liable to the lime company, and thus might possibly be made to pay the same claim twice should the limit of their liability not be otherwise reached. But here plaintiff shows that Ware's claim is made up in part of the lime company's claim, and the complaint alleges, although not sustained by the proof, that the lime company had assigned its claim to plaintiff. It was admitted at the trial that any payments made to the lime company should be credited upon the claim of Ware. It seems to us, in view of the pleadings and the admissions, defendants should not be subjected to the possibility of being called upon twice to pay the lime company claim. Plaintiff concedes that if it is included in the Ware claim this may happen. In view of all the facts, it seems to us more consonant with justice, as well as in keeping also with the theory on which plaintiff brought action, to disallow this item, and reduce his judgment accordingly. The total judgment, including the lime company claim, is for $442.75. The judgment should be modified by reducing it $30.50, and as thus reduced should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is modified by reducing it $30.50, and as thus reduced is affirmed.

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## EASTON PACKING COMPANY v. KENNEDY et al.

S. F. No. 2118; December 24, 1900.

63 Pac. 130.

**Promissory Note—Failure of Consideration.—Defendants Executed Two Notes,** for $385 each, in payment of a commission for selling land, and payable only in the event that the vendees of the land remained on it for one year, and made improvements equal in value to the notes. The vendees plowed one hundred acres, which

increased its value $2.50 per acre, erected buildings, constructed drainage worth $75, and a levee worth $64, but with the consent of defendants, to whom they executed a reconveyance, abandoned the premises before the expiration of the year. Held, that a finding that there was not a failure of consideration for the notes was proper.

**Promissory Note—Bona Fide Holder.—Where There was Sufficient Evidence** of plaintiff's ownership of the notes in suit, and the court found against the defendants on the only defense set up by them, error of the court in finding that plaintiff came into possession of the notes without notice of equities in favor of defendants was harmless.

**Promissory Note—Conditional Delivery.—Error in Rejecting Certain Evidence** as to the conditional delivery of a note was cured by the subsequent admission of all facts tending to show the real consideration for the note.

**Promissory Note—Failure of Consideration—Evidence.**—Where the makers of notes resisted payment on the ground of failure of consideration, evidence to vary the terms of the notes, which in no way related to consideration, was properly excluded.

APPEAL from Superior Court, Fresno County; E. W. Risley, Judge.

Action by the Easton Packing Company against J. W. Kennedy and others. From a judgment in favor of plaintiff and from an order denying a new trial defendants appeal. Affirmed.

Harris & Hubbard and George L. Warlow for appellants; Frank Kauke and A. M. Drew for respondent.

CHIPMAN, C.—Action on two promissory notes. The complaint was dismissed as to defendant Pool. Plaintiff had judgment against defendants Kennedy and McCormick, from which, and from the order denying motion for new trial, they appeal. The notes in suit were executed by defendants, and delivered to one Summers, the payee, October 30, 1893, and each was for $385, due one year from date, and provided for payment of a reasonable attorney's fee and expenses of suit, if sued upon. Plaintiff became the holder and owner of the notes, as found by the court, January 19, 1897. Defendants, in a separate defense, alleged that it was agreed that the notes were "payable only in the event that the purchasers of certain real property, that day (October 30, 1893) conveyed to certain parties by these defendants, should make

the payments for said property as stipulated in the agreement of purchase and sale and the mortgage for the purchase price of said premises, in which sale the said Summers had assisted"; that the true and only consideration for the notes was the payment to be made by the purchasers of said property; that before the maturity of the notes sued on the purchasers abandoned it, surrendered possession to defendants, and refused to continue in possession of the property under the agreement of purchase or to make any payments; that the consideration for said notes has wholly failed. The court found that Summers rendered service to defendants Kennedy and McCormick in negotiating and assisting in a sale and in securing purchasers for certain real estate belonging to Kennedy and McCormick, and the notes sued on were executed for and in consideration of said services so rendered, and said services were rendered and fully performed at and prior to the execution of said two notes on the said thirtieth day of October, 1893. And said notes were payable one year after their said date, and were so payable without regard to the payments to be made by the said purchasers of said real property. The court found against defendants on the special defense pleaded, and finds that the consideration for the notes had not failed.

The evidence showed that the notes represented Summers' commission for finding purchasers for the Kennedy and McCormick land. He found the purchasers, and the sale was made, the vendees taking a deed. They assumed the payment of a mortgage resting on the land for $4,000, and gave their notes and mortgage for the balance of the purchase price, the first notes falling due two years after date, or one year after the notes in question became due. The remaining ten equal payments matured at annual intervals of one year, the last being twelve years from date. Defendants seem to have abandoned the special defense set forth, and relied on evidence that the consideration was that the vendees of the land should remain on it for at least one year, and within that time make certain improvements, of a value not less than the notes given to Summers. Kennedy and McCormick testified that such was the consideration for the notes. Summers was called as a witness for defendants. He was not asked by defendants as to the consideration of the notes nor as to the alleged agreement. On cross-examination he testified:

"These two notes came through a land transaction for commission. At the time of the delivery of these notes there was nothing further that I had to do. As far as I had to do the sale was complete, but there was a stipulation—a verbal agreement—" The witness was interrupted by plaintiff's counsel at this point, and was told that he had not asked him as to any agreement, and this witness for some reason was not interrogated by either party as to the consideration for the notes, although he was a party to the alleged agreement that they were not to be paid unless the work referred to was performed. There was evidence tending to show that the vendees of defendants plowed about one hundred acres of the land, and that this was worth $2.50 per acre; that they made some improvements thereon, erected some buildings of uncertain value, dug a half mile of drainage ditch, costing $75, and erected a levee of about same length, costing forty cents a rod. There was some question as to whether the work was judiciously made, and benefited the land to the extent of its cost. But the alleged agreement proven may fairly apply to work done, and not to its ultimate value to the property. It appeared, also, that the vendees left the ranch before the first year expired, and refused to return to it when requested by defendants; and defendants thereupon, on November 8, 1894, a few days after the notes here in suit were due, and without the consent of the holders of the notes, took a reconveyance of the property from the purchasers, and canceled their notes and mortgage, and allowed the vendees to remove the buildings from the land. What became of the vendees' obligation to pay the prior mortgage is not shown, and so far as appears they are still liable for that amount, and defendants have the benefit of the agreement to pay this amount. It appears, also, that while Summers held the notes it became necessary for him to raise $200, which he was enabled to do by procuring the individual indorsement of one Rowell, then president of plaintiff company, and delivered the notes in suit to Rowell as collateral security, and he delivered them to the bank that furnished the money, with the note signed by Summers as principal and Rowell as surety. Before Rowell consented to become surety for Summers, he spoke to defendant McCormick, one of the owners of the land, about the notes in suit. Rowell testified: "Before I took these notes at all, I saw McCormick in regard to them, and asked

him if the notes were all right. He said they were, and if it hadn't been for that I never should have taken them. Had no knowledge or information of the notes prior to that time. Had no other information than what I got from McCormick at that time." He further testified that McCormick explained to him that the notes were given to Summers "as commission on a land trade"; that he asked him if there was any condition, and McCormick said that Summers was to keep the notes until a certain amount of work was done on the land, "and that the work was done, and more too." Defendants paid $114.29 on this note, which was credited on the notes in suit by the court.

Conceding that defendants showed that the consideration for the notes was the doing of certain work by the vendees of defendants, and that the vendees would remain on the property one year, the evidence is sufficient to warrant the trial court in its finding that the consideration had not failed. I do not think the fact that the vendees left the land before the expiration of the year shows failure of consideration; the essential thing to defendants, as guaranty of good faith in making the purchase, was that the vendees should expend an amount of money on the land at least equal to the commissions paid to Summers. They did the work, but concluded to give up the place, and defendants consented that they should do so, and took a reconveyance, and canceled the mortgage.

Appellants claim that the findings that plaintiff came into possession of the notes on January 19, 1897, as owner and holder, without notice of any defense by the defendants, is not justified by the evidence. Conceding that plaintiff took its title to the notes subject to all the equities of the makers, the evidence supports the findings of the court against the only defense set up by defendants, and it is therefore immaterial whether or not plaintiff had notice, and, if the court erred in finding that plaintiff had no notice of any defense claimed by defendants, the error was harmless. There is sufficient evidence of plaintiff's ownership of the notes.

Error is claimed in rejecting certain of defendants' offered evidence relating to the alleged conditional delivery of the notes to Summers. The points raised would be worthy of attention if it did not appear from the record that defendants succeeded in getting before the court all the facts

bearing upon the question of the consideration for the notes. We have carefully examined the alleged errors, and, conceding error, we find them cured by the unrestrained admission of all the facts tending to show what the consideration was. Evidence tending to vary the terms of the note, not related to the question of consideration, was properly excluded. We advise that the judgment and order be affirmed.

We concur: Cooper, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## PEOPLE v. MENDENHALL.*

Cr. No. 658; January 15, 1901.

63 Pac. 675.

**Assault to Kill—Malice—Instructions.**—On prosecution for assault with intent to murder, an instruction that the malice necessary to make a killing murder might be either express or implied, though technically correct, was inapplicable and erroneous, as the intent must be proved in such prosecution, and implied malice may show no actual intent.

APPEAL from Superior Court, City and County of San Francisco; F. H. Dunne, Judge.

William P. Mendenhall was convicted of assault with intent to murder and appeals. Reversed.

Leon E. Prescott for appellant; Tirey L. Ford, attorney general, for the people.

HENSHAW, J.—The defendant was charged with and convicted of the crime of assault with intent to commit murder, and appeals from the judgment given against him. The court instructed the jury as follows: "Murder is the unlawful killing of a human being with malice aforethought. Such

*For subsequent opinion in bank, see 135 Cal. 344, 67 Pac. 325.

malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no deliberate provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." It is insisted that this instruction, while pertinent and proper in a charge upon the crime of murder, is improper and erroneous where the offense is an assault with intent to commit murder; that the charge of murder may be established in the absence of proof of an intent to kill, but that the charge of attempt to commit murder cannot be established by proof merely of implied malice. In this we think the appellant's contention is sound, and that, in the crime charged, the court erred in instructing the jury as it did. In People v. Mize, 80 Cal. 41, 22 Pac. 80, there came under the attention of this court the following instruction: "They [the defendants] cannot be convicted of an assault to commit murder unless the evidence shows beyond a reasonable doubt that, had the prosecuting witness been killed, defendants would have been guilty of murder. If the evidence shows that, had Henry Coffey been killed, one of the defendants would have been guilty of murder, then that one should be convicted." This court held the instruction to be erroneous, laying down the unquestioned proposition that while, to constitute murder, the guilty person need not intend to take life, to constitute an assault with intent to murder, there must be proved the intent to take life, and though the wrongdoer's act is such as, were it successful, it would be murder, if in truth he did not mean to kill he is not guilty of an assault with intent to commit murder: 1 Bish. Cr. Law, sec. 270; 2 Bish. Cr. Law, sec. 741. In People v. Wallace, 101 Cal. 281, 35 Pac. 862, an instruction identical with the one in the case at bar was complained of, but it was there said that, conceding the instruction to be erroneous, the defendant could not have been injured by it, as he was acquitted of the offense to which it applied. In People v. Burgle, 123 Cal. 303, 55 Pac. 998, defendant complained because the court instructed the jury upon express malice alone, properly excluding from their consideration the definition of implied malice. It was said by this court that it is doubtful whether the language of section 188 of the Penal Code should be given to the jury at all in the case of assault with intent to commit murder, and that it was inti-

mated in People v. Wallace that the section should not be given, because "implied malice is not equivalent to that actual intent which is essential to the crime of assault with intent to commit murder." Under our code a conviction of murder may be sustained either where a deliberate intent is manifested to take away the life of a fellow-man, or where no considerable provocation appears, or where the circumstances attending the killing show an abandoned and malignant heart. Where a deliberate intent appears, there is present the express malice of the law. In the latter class of cases the malice is implied—the law presuming it from the circumstances of the case—though in fact the actual and deliberate intent to kill may not have been present in the mind of the wrongdoer. Therefore, it is only in cases of murder of the first class, where express malice and deliberate intent are shown, that, the attempt failing, the wrongdoer may be found guilty of an assault with intent to commit murder. In murders of the other category the specific crime here charged is not contained.

Appellant further complains of the following instruction: "It is incumbent upon the prosecution to prove the intent, and if it appear that the alleged assault was committed under such circumstances as would, had death ensued, have mitigated the offense from murder to manslaughter, such intent was not premeditated, and you cannot find the defendant guilty of the charge preferred against him." This instruction is legally correct, though it is by no means a full exposition of the law. It is certainly true that in a case where, if death had ensued, a conviction of manslaughter alone would have been justified, the defendant (death not having resulted) could not be convicted of an assault with intent to commit murder; but, upon the other hand, as has been pointed out, even if death had ensued under circumstances which would have made the crime murder, he still could not be properly convicted of the lesser charge (the victim surviving) unless it were a murder committed with express malice.

The error in the instruction first above quoted was manifestly prejudicial. It cannot be said that the error was cured and rendered harmless by other instructions. The judgment is therefore reversed and the cause remanded.

We concur: Temple, J.; McFarland, J.

## PEOPLE v. YOUNG.

Cr. No. 631; February 9, 1901.

63 Pac. 837.

**Homicide—Character of Deceased.—A Charge on a Murder Trial** that evidence of the character of deceased, tending to show that he was a violent, quarrelsome and dangerous man, was not admitted as tending "in any way" to justify his slaying by accused, was not improper when qualified by the rest of the instruction, to the effect that the evidence of bad character was to be considered only as a circumstance illustrating the facts of the homicide, and indicating the aggressor and the nature of the aggression.

APPEAL from Superior Court, Mendocino County; J. M. Mannon, Judge.

G. G. Young was convicted of manslaughter and he appeals. Affirmed.

Arthur J. Thatcher and L. J. Maddux for appellant; Tirey L. Ford, attorney general, for the people.

PER CURIAM.—The defendant was charged with murder, and appeals from a judgment convicting him of manslaughter and from an order denying him a new trial.

It appears that on the twentieth day of July, 1899, at 4 or 5 o'clock in the afternoon, the defendant and Caleb Greenwood, with several other persons, were in the saloon of Charles Lockhart, near Monroe postoffice, in Mendocino county. Greenwood and defendant being both under the influence of liquor, they were soon engaged in a war of words, which concluded with Greenwood committing a violent, brutal and unjustifiable assault on Young, in which Young was thrown down on the floor at least twice. He was kicked and badly wounded in the face, the clothes were torn from his body, and he was otherwise maltreated by Greenwood. This brutality finally ended, without any interference on the part of the bystanders, and Young retired to a rear room, reclothed himself, returned, treated all hands, including Greenwood, and left the saloon. About two hours later Young reappeared at the saloon with a Winchester rifle in his hands,

and inquired for Greenwood. He remained on and about the premises for about half an hour, and during that time he took a drink with a friend, and asserted that he was a bad man, and would not be walked on, talked about shooting the bottles off the bar, wanted to find Greenwood, and said, "I'll fix him; I'll allow no man to stamp me in the floor." Soon after all this, and about two and one-half hours after the assault on him by Greenwood, the defendant went out at the front door of the saloon, with his gun still in his hands, intending, as he testified, to go to the pump at the rear of the saloon to wash the blood off his face. When the defendant was near the rear end of the saloon, he saw Greenwood at the rear door thereof, and shot him twice, from the effects of which Greenwood died on the following day. The defendant testified that immediately before the shooting Greenwood straightened up, and slapped his left hand on his hip pocket, and said, "I am heeled, you son-of-a-bitch." Defendant also testified that before the trouble with Greenwood, and on that same day, he saw the handle of a pistol in Greenwood's pocket. An apparently disinterested eye-witness testified that at the time of the shooting Greenwood was standing with one foot on the step, with his hand on the door, and the right hand by his side, and made no hostile movement, and, when Young came around, Greenwood said, "Don't shoot me, Gib!" Another witness, who heard the shooting, and went to Greenwood where he fell, and stayed with him till he was removed, testified that he searched Greenwood, and found no weapon on him. There was no evidence except defendant's testimony tending to show that Greenwood was armed at the time of the shooting. It was shown without conflict in the evidence that Greenwood's reputation in the neighborhood for peace and quietude was bad, and that defendant was well acquainted with that fact.

The only reasons urged for a reversal on this appeal are that the court erred in refusing defendant's offered instruction No. 7, and in giving the instruction No. 12 requested by the prosecution. Said refused instruction reads as follows: "Evidence has been offered as to the character of deceased, Greenwood, for peace and quiet. I charge you that, in case of doubt as to who was the aggressor, the previous character of the deceased for peace and quiet is an important element to be considered by the jury. If you believe from the evi-

dence that the deceased was a quarrelsome and dangerous man, and had the reputation of being a dangerous and quarrelsome man in the community in which he lived, you have the right to take these things into consideration in determining as to the danger the defendant, Young, was in when he fired the fatal shot." The instruction given is as follows: "Evidence has been introduced before you of the character of the deceased, and tending to show that he was a violent, quarrelsome and dangerous man. This was not admitted as tending in any way to justify his slaying by the defendant. A party has no more right to slay a bad man than a good one. Both are equally protected under the law. The unwarranted slaying of either is equally a crime. The evidence of bad character is to be considered by the jury only as a circumstance illustrating the facts of the homicide, and indicating the aggressor and the nature of the aggression; it being more probable that a man of violent and dangerous character would make an unprovoked and deadly assault than that a quiet and peaceable man would do so." There is no valid objection to the instruction given. The words, "This was not admitted as tending in any way to justify his slaying by the defendant," when read with and qualified by the rest of the instruction, are not improper; and the instruction, thus read, correctly enunciates a principle of the law of evidence applicable to the case in hand. The instruction given substantially covers every proposition contained in the refused instruction, and is as favorable to the defendant as he could reasonably ask. In addition to this, the court also instructed the jury fully as to the law of self-defense as it applied to the case. For the reasons given, there was not any error in refusing the one or in giving the other of the instructions quoted. The judgment and order are affirmed.

## LATHROPE et al. v. FLOOD.*

S. F. No. 1703; February 20, 1901.

63 Pac. 1007.

**Physicians—Abandonment of Case—Damages.**—Defendant was employed to attend plaintiff during her first confinement. He assumed charge of the case, visiting plaintiff at intervals, until he deemed it the proper time to employ instruments to aid in the delivery of the child, whereon the plaintiff shrank back and screamed, compelling the defendant to let go the instruments. Defendant threatened the plaintiff that if she did not quit screaming he would quit the case, and on the failure of a second or third attempt to use the instruments he abruptly left the house. This was at midnight, and it was an hour or more before another physician could be obtained, who, on examination, found that plaintiff's condition was not such as to require the use of instruments just then. Held, that a verdict of $2,000 was not excessive for the unwarranted abandonment of the case and the mental suffering occasioned plaintiff thereby.[1]

APPEAL from Superior Court, City and County of San Francisco; William R. Daingerfield, Judge.

Action by Margaret A. Lathrope and another against P. H. Flood. From a judgment in favor of the plaintiffs the defendant appeals. Affirmed.

Garret W. McEnerney for appellant; Wm. S. Barnes and Edgar D. Peixotto for respondents.

HENSHAW, J.—This is an action against a physician to recover damages for the alleged injuries occasioned by his negligent and unskillful treatment of his patient, and for injuries resulting from the violation of his contract of em-

*For subsequent opinion in bank, see 135 Cal. 458, 57 L. R. A. 215, 67 Pac. 683.

[1] Cited in note in Ann. Cas. 1912C, 832, on liability of physician for lack of diligence in attending patient.

Cited in Manser v. Collins, 69 Kan. 297, 76 Pac. 853, where the court says: "Mental suffering, however, resulting from the injury which arises in his mind, but is not a part of the pain naturally attendant on and connected with the injury, cannot be regarded as an element of damage."

ployment in abandoning her case, and leaving her, in a critical period, without proper or any medical attendance. The case was tried by a jury, which rendered a verdict for plaintiff in the sum of $2,000. This appeal is taken from the judgment and from the order denying the defendant a new trial.

The defendant, P. H. Flood, a practicing physician in San Francisco, was employed by the plaintiffs to attend Margaret Lathrope in her prospective confinement. She was a young married woman, and pregnant with her first child. At the beginning of her labor, Dr. Flood was sent for and attended. He concluded that the case would be a prolonged one, and went away, visiting the house at intervals. He returned on the evening of the twenty-seventh day of April, and after examination of his patient decided that it would be necessary to employ instruments to aid in the delivery of the child, and that the time for the use of such instruments had arrived. He therefore ordered the attendant nurse to place the patient in proper position, and inserted the instruments, whereupon the sick woman, in fear, or pain, or both, shrank back, compelling the doctor to let go of the instruments or greatly imperil the lives of both mother and child. He made a second effort with like result, and perhaps a third, though this is in controversy. He testifies that he warned the woman to be quiet, and explained to her the danger, both to herself and unborn infant, occasioned by her conduct, and finally told her that, if she "did not quit, he would quit." Upon the part of the plaintiff the evidence is that the woman was suffering excruciating pain, which was increased by the insertion of the instruments; that she screamed, whereupon the doctor said: "You quit your screaming. If you don't quit, I'll quit." Upon the failure of a second or a third effort to employ instruments, the defendant abruptly left the house, without a word of explanation or suggestion to anyone. This was about midnight. The husband followed him into the street, imploring him to return, and not to leave his wife in that condition. The defendant refused. "The doctor's reply was, in substance, that the woman screamed, and he was not used to working for women that screamed. The doctor also said that there were plenty of doctors around, and that I could go to the German Hospital. I said 'I know you cannot get doctors from the German Hospital at this time of

night.'" Mr. Lathrope asked him to recommend somebody, and the doctor replied: "You can get anyone you like. Get whoever the devil you please. I am not going back." Then he walked away. After an interval of an hour or more, during which time the patient was left with knowledge that the physician had abandoned her, and without any medical attendance, the presence of another physician was secured. He found her not so far advanced in parturition as to require the use of instruments until some six or eight hours afterward, when, by their aid, he delivered her of an infant, which lived about eight minutes. It does not appear that defendant's treatment of the case up to the time of his abandonment of it was either negligent or unskillful. It does not appear that undue physical injuries were inflicted by his treatment, either upon the mother or the child. If either suffered in this respect, it is demonstrated that the actuating cause was the conduct of the patient in moving and shrinking while the instruments were actually inserted. Upon this it is contended by appellant that the verdict is grossly excessive, and that it would be difficult to sustain a verdict even for nominal damages. But other considerations enter into the determination of the question. It is the undoubted law that a physician may elect whether or not he will give his services to a case, but, having accepted his employment, and entered upon the discharge of his duties, he is bound to devote to the patient his best skill and attention, and to abandon the case only under one of two conditions: First, where the contract is terminated by the employer, which termination may be made immediate; second, where it is terminated by the physician, which can only be done after due notice, and an ample opportunity afforded to secure the presence of other medical attendance. Much expert testimony was given by physicians in this case to the effect that the relation of confidence between physician and patient is all-important, and that a physician is justified in abandoning a case where that relationship does not exist. This is quite true, but the circumstances of abandonment are equally important. He can never be justified in abandoning it as did this defendant, and the facts show a negligence in its character amounting well-nigh to brutality. A young woman is in the throes of labor with her first child. She is suffering apparently not only the natural travail, but something more. Her condition is such that the

physician has decided that the time to employ instruments to aid her delivery is at hand. He does employ them; and because the woman, in her fear and anguish, is refractory, he, as he himself testified, "became disgusted"; "he was not a child, to be trifled with"; and so leaves the house in the dead hour of the night, without time or opportunity afforded for the family to procure the attendance of another doctor. Such conduct evidenced a wanton disregard, not only of professional ethics, but of the terms of his actual contract. It was a violation of that contract, and for all damages that resulted the defendant is justly responsible: Barbour v. Martin, 62 Me. 536; Ritchey v. West, 23 Ill. 385; Lawson v. Conaway, 37 W. Va. 159, 38 Am. St. Rep. 17, 18 L. R. A. 627, 16 S. E. 564. The plaintiff testifies that her physical sufferings greatly increased after the doctor's departure, and while she was thus left unattended. What her mental sufferings, perturbation, and fear were, the evidence abundantly shows; and, indeed, it was most natural, under the existing circumstances, believing she was going to die, passing through woman's martyrdom thus unaided, that her mental anguish should have been most acute. The law has no scales by which to measure with exactness such mental suffering and the reflex effect of such mental suffering upon the physical condition. The jury, for the injuries suffered by plaintiff, were instructed that in fixing compensatory damages they were to take into consideration the physical injury and suffering and the mental suffering and humiliation, if any, caused by the defendant's negligent act or breach of contract. We can perceive nothing excessive in the verdict which they rendered, and nothing to indicate that they must have been influenced by passion or prejudice. The judgment and order appealed from are therefore affirmed.

We concur: McFarland, J.; Temple, J.

# WHITE v. COSTIGAN.*

S. F. No. 1663; February 23, 1901.

63 Pac. 1075.

**Receiver's Sale.—Though a Receiver's Sale of Land had Been Held to be Unauthorized on appeal in another suit, the facts affecting the validity of the sale not appearing from the record in the case at bar, and it having been expressly found in the trial court that the sale was properly made, it would be assumed, for the purposes of the case, that the sale was valid.**

**Mortgage—Deficiency Judgment.—Where, on Foreclosure of a Mortgage,** a deficiency judgment was entered in favor of a junior mortgagee, but prior to his judgment a portion of the mortgaged lands not included in his mortgage had been conveyed by receiver's deed, he was not entitled to redeem such lands, under Code of Civil Procedure, section 701, giving a right of redemption to creditors having a lien.

**Mortgage—Redemption.—Where a Purchaser at Mortgage Sale** made a quitclaim deed of the land to the owner, such deed operated as a redemption, and perfected the owner's title.

**Mortgage—Redemption.—By Code of Civil Procedure,** section 703, a redemption from a mortgagee is followed by a sheriff's deed, and section 705 requires a redemptioner to serve, with his notice of redemption to the sheriff, a copy of any assignment necessary to establish his claim. Held, that where, after mortgage foreclosure, the purchaser on mortgage sale gave a deed of the premises to the owner, and prior thereto, and with the knowledge of the owner, one who was unauthorized to redeem attempted to do so, and paid the redemption money to the sheriff, under section 703 the redemption was virtually an assignment of the purchaser's interest, though the sheriff was not authorized to make the deed under section 705, and hence should be regarded as the assignee of the purchaser, and the owner entitled to have her title quieted only on condition of paying the redemption money to the redemptioner.

**Mortgage—Redemption.—Where the Purchaser at Mortgage Sale** gave a deed of the premises to the owner, and prior thereto one not entitled to redeem had paid the redemption money to the sheriff, the redemptioner's right to be regarded as the assignee of the purchaser's interest, being purely one in equity, did not extend to the forfeiture of the owner's title for nonredemption, she not being affected by the transaction between the purchaser and the redemptioner, and the deed from the purchaser being, in effect, a redemption.

*For subsequent opinion in bank, see 134 Cal. 33, 66 Pac. 78.

**Mortgage—Redemption.—Where One Who was not Authorized** to redeem from a mortgage sale paid the redemption money to the sheriff, such redemptioner had a right to have his equitable title perfected by a conveyance from the owner, to whom the purchaser thereafter conveyed the land.

**Mortgage—Redemption.—Where One Who was not Authorized** to redeem from a mortgage sale paid the redemption money to the sheriff, his right to be repaid his money, or to have a conveyance from the owner of the lands, being an equitable one merely, he should be allowed legal interest only on the amount paid by him from the date of payment.

APPEAL from Superior Court, Mendocino County; J. M. Mannon, Judge.

Action by Frankie White against James M. Costigan. From a decree in favor of defendant, plaintiff appeals. Reversed.

Wm. T. Baggett, J. Q. White, Geo. E. Whitaker and Walter H. Linforth for appellant; Seawell & Pemberton for respondent.

SMITH, C.—The suit was brought to quiet title to the lands described in the complaint. Judgment was rendered for the defendant. The appeal is from the judgment, and on the judgment-roll. Both parties deraign title from one George E. White, plaintiff's divorced husband. White had mortgaged the lands in controversy and other lands to one Fairbanks, and afterward some of the same lands, but not the lands in controversy, to the defendant Costigan. Suit was commenced by Fairbanks, January 15, 1895, for foreclosure of his mortgages, to which Costigan was made defendant as junior mortgagee. Pending this suit the mortgages of Fairbanks were assigned to the plaintiff herein, and by her to one Linforth, who was substituted as plaintiff. Judgment for foreclosure was entered—date not given—and on March 6, 1897, the lands included in the Fairbanks mortgage were sold by the sheriff, and on the return of the sale, March 25, 1897, a deficiency judgment for $3,937 was docketed in favor of Costigan. At the sale Linforth became the purchaser of the lands in controversy for the sum of $500. Costigan redeemed from the sale, within the time allowed by law for redemption, paying the redemption money to the sheriff, and receiving his

certificate, and afterward his deed for the land sold. The redemption money was paid to, and accepted by, Linforth. The redemption was regular in all respects except as to Costigan's right to redeem. On the day after redemption, September 8, 1897, Linforth made a quitclaim deed of the land to the plaintiff, who paid no consideration, and took the deed with notice of the redemption and of the acceptance of the money by Linforth. The plaintiff deraigns title under the deed last referred to, and also under receiver's deed—date not given, but recorded November 21, 1896—made in pursuance of a sale under an order of the superior court of San Francisco of date April 12, 1895, and an order of confirmation of date May 5, 1896, in a divorce suit therein pending between herself and her husband. The validity of this sale was involved in the case of White v. White (decided by the court in bank, December 6, 1900), 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062; and it was there held, on the facts appearing in that case, that the court was without jurisdiction to order the sale, and the sale and deed made in pursuance thereof consequently void. But in this case the facts affecting the validity of the order of sale do not appear, and it is expressly found that the order of sale, and the order confirming the sale, were "duly made and entered" by the court, and that thereafter a deed was executed to the plaintiff by the receiver "conveying to (her) all the right, title, and interest of the said George E. White in and to the lands .... sold, .... including the premises described in the complaint." Hence there is nothing in the record here to show want of jurisdiction in the court; and the maxim, "De non apparentibus, et non existentibus, eadem est ratio," must be applied. It must therefore be assumed, in this case, that the sale was valid.

The relations of the parties to the land in controversy appear, then, to be as follows: Mrs. White, after the foreclosure sale, was the legal owner of the land, and entitled to redeem. By the quitclaim deed from Linforth, she acquired whatever interest he had at the date of the deed, which, unless he had previously parted with his interest as purchaser, perfected her title. But in the meanwhile Costigan had redeemed from Linforth, and, if he thereby acquired any rights, these could not be affected by the deed to Mrs. White. The questions involved relate, therefore, to the validity and effect of this redemption. In considering them, the legal and the equitable

aspects of the case must be carefully distinguished. The former will be first considered.

1. The redemption was made by Costigan under his deficiency judgment of March 26, 1897. But before that time the title to the land in controversy had passed by the receiver's deed to Mrs. White. His judgment, therefore, was not a lien upon the land, and did not entitle him to redeem: Code Civ. Proc., sec. 701. The sheriff's deed was therefore wholly void. "To be entitled to redeem, [the party], must be a creditor having a lien": Haskell v. Manlove, 14 Cal. 57. The power of the sheriff to transfer the title of the judgment debtor or his successor, in invitum, "is altogether statutory, and his acts are nugatory, unless the provisions of the statute are pursued": Wilcoxson v. Miller, 49 Cal. 194. The case, therefore, in its legal aspect, was not affected by the attempted redemption. The legal title was already vested in Mrs. White, but was subject to forfeiture for failure to redeem within the period presented by the statute. The deed removed this liability, and in effect operated as a redemption from the sale. Thenceforth her title, i. e., her legal title, ceased to be subject to forfeiture, and thus became perfect.

2. It remains to be considered whether, by his attempted redemption, Costigan acquired any equitable rights, and, if so, what these may be. With regard to this question, Mrs. White appears in double capacity, or rather in two capacities, namely, as the successor of the judgment debtor, and as the successor of the purchaser, Linforth. In the former capacity she was the owner of the land, subject to forfeiture for nonredemption, and, as she was not a party to the transaction between Linforth and Costigan, her title was not affected thereby. But as grantee in the deed from Linforth she took subject to any equities existing against him in favor of Costigan. The question between her and Costigan is therefore the same, with regard to such equities, as would have been the question between him and Linforth if the deed had not been made. Stated generally, the question involved is as to the effect of a redemption from an execution sale by an unqualified redemptioner accepted or acquiesced in by the purchaser. On this point it seems to be settled that the purchaser is estopped to dispute the validity of the redemption: 3 Freem. Exns., sec. 317, p. 1870, and cases cited. But whether such estoppel will operate to transfer the interest of

the purchaser to the redemptioner must depend upon the statutory provisions of the particular state. Thus, in Illinois —where the effect of redemption is simply to extinguish the purchaser's interest, and thus to subject the property to the redemptioner's lien—it has been held that a redemption by an unqualified redemptioner cannot be treated as an assignment, though it is suggested that even there the redemptioner, in a proper proceeding in equity, might be subrogated to the rights of the purchaser: Meyer v. Mintonye, 106 Ill. 414; Freem. Exns., sec. 321, pp. 1885, 1886. But in this state, by the provisions of our statute, the redemption is followed by a deed (Code Civ. Proc., sec. 703), and hence "the redemption is virtually a transfer of the certificate of sale": Bagley v. Ward, 37 Cal. 129, 130, 99 Am. Dec. 256; Eldridge v. Wright, 55 Cal. 536.

In Bagley v. Ward the redemptioner was qualified to redeem, but it was objected that the papers required by the statute were not produced to the sheriff, which ordinarily would render the redemption void: Code Civ. Proc., sec. 705; Haskell v. Manlove, 14 Cal. 54; Wilcoxson v. Miller, 49 Cal. 193. It was held that, "as between the immediate parties to the redemption, the production of the papers mentioned in the statute (might) be waived," and that the sheriff's deed passed a good title. In the case at bar the redemptioner was not entitled to redeem, and hence the sheriff has not authorized to make the deed; but the principle that a redemption, under our laws, is virtually an assignment, applies. And, indeed, this is evident from the nature of the transaction; for, as the end and effect of the redemption is to transfer the title, this interest must necessarily enter into the minds of the parties, and the transaction thus contains in itself all the elements of a valid assignment except the formal writing: Civ. Code, secs. 1066, 1636, 1646, 1647. In this case, for lack of the written assignment, the sheriff had no authority to convey (Code Civ. Proc., sec. 705); but nevertheless the intent is apparent, and the transaction, interpreted in the light of the circumstances, and of the law and usage of the state, must be regarded in equity as an assignment of the purchaser's interest. Accordingly, in Abadie v. Lobero, 36 Cal. 396, 397, which was a case of redemption by an unqualified redemptioner, it was assumed (though not expressly held) that, "since (the purchaser) was satisfied and treated the redemp-

tion as valid, it was good, or, if not good as a redemption as between the parties, amounted to an assignment of the certificate of sale," and this opinion is referred to with apparent approval in Eldridge v. Wright, 55 Cal. 536, 537, and in the concurring opinion in effect affirmed. The defendant must therefore be regarded as occupying the position of equitable assignee of Linforth's interest, and is entitled to have his equitable right perfected. But his right, which is purely of equity cognizance, does not extend to the forfeiture of the plaintiff's title for nonredemption; for, as to her original title, she was not affected by the transaction between Linforth and the defendant, and from the legal point of view the deed from Linforth was, in effect, a redemption. Nor, were it otherwise, could equity assist him in enforcing a forfeiture. The plaintiff is therefore entitled to have her title quieted, but only on the condition of paying to the defendant the amount paid by him for redemption. The defendant has a right to have his equitable title perfected by a conveyance from the plaintiff, if she does not redeem; and, as his right is merely equitable, he should be allowed and the plaintiff required to pay legal interest only on the amount paid by him ($560) from the date of payment. The time for redemption should be limited to a reasonable time, not exceeding six months from the entry of the judgment herein ordered. I advise that the judgment be reversed and the cause remanded, with directions to the court below to render judgment on the findings in accordance with this opinion.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to render judgment on the findings in accordance with this opinion.

## BRUNNINGS v. TOWNSEND.

S. F. No. 2502; March 1, 1901.

64 Pac. 106.

**Appeal—Time to File Transcript.—An Appeal was Taken**, and the appellant also brought a mandamus as to the same controversy; and the appellant was granted forty days after the decision of the mandamus proceeding in which to prepare, serve and file the printed transcript in the appeal case. The mandamus proceeding was in bank, and determined adversely to the appellant, but he presented no petition for a rehearing. Held, that the time to prepare and file the transcript commenced to run on the determination of the mandamus proceeding, instead of after the expiration of thirty days thereafter in which a rehearing could be granted.

**Appeal.—Where a Transcript is not Filed Within the Time** granted by the supreme court, but such failure is due to a mistake as to when such time expired, and is filed shortly thereafter, and no material delay is occasioned, and no costs are caused to respondent, the appeal will not be dismissed therefor.

APPEAL from Superior Court, City and County of San Francisco; F. M. Angellotti, Judge.

Action by Mary Brunnings, an insane person, by her guardian, E. Myron Wolf, against Hulda R. Townsend. From a judgment in favor of plaintiff, defendant appeals. Motion to dismiss appeal denied.

Foshay Walker for appellant; W. L. Pierce for respondent.

BEATTY, C. J.—In this case the superior court made an order for the payment of an attorney's fee out of the estate of the plaintiff. After payment by the guardian, the appellant, Townsend, made a motion to vacate the order allowing the attorney's fee, and requiring its repayment by the attorney, with interest. In due time the superior court made an order which expressly vacated the previous order allowing the attorney's fee, but was not explicit upon the point of repayment. The appellant, acting upon the theory that the effect of the second order was to deny that part of her motion relating to repayment, took this appeal from such denial. But apprehending that it might be held that there had been

no decision upon that part of the motion, and in order to be safe, she at the same time commenced an original mandamus proceeding in this court to compel a decision. On the 7th of August, 1900, that case was decided here, the court in bank holding that the motion had been fully decided and that the legal effect of the order was to deny that part of the motion relating to repayment: Townsend v. Angellotti, 129 Cal. 466, 62 Pac. 59. The result of that decision was to vindicate the propriety and necessity of this appeal as the proper and only remedy of the appellant for any wrong she may have suffered in consequence of the action of the superior court. Pending the decision of the mandamus case, on the sixth day of June, 1900, this court made an order in the present case granting the appellant "until and including forty days after final decision of this court in the mandate proceeding . . . . within which to prepare, serve and file her printed transcript on appeal herein." The printed transcript herein was served on respondent September 26, 1900—more than forty days after our decision in the mandate proceeding was filed—with a request that he stipulate its correctness. On October 1st respondent returned the transcript, declining to stipulate. After some delay, and after making numerous corrections, the county clerk certified the transcript; and on October 15th it, with the requisite number of copies similarly corrected, was filed in this court. In the meantime, on October 12th, respondent had served notice of this motion to dismiss the appeal for the failure to file the record within the time prescribed by the rule of court and the order extending time. The decision of this motion to dismiss requires a construction of the order extending time as to the date when the forty days began to run. Respondent contends that the time began to run on the 8th of August, when our decision was filed, while appellant contends that it did not begin to run until the expiration of the thirty days during which the remittitur is ordinarily retained in appeal cases, and during which a rehearing may be ordered. We do not think appellant's construction of the order extending time can be upheld. In case of an appeal decided in department, where, in the absence of a special order for an earlier issuance of the remittitur, the judgment is not final until the lapse of thirty days, his argument would have some force; but this was an original proceeding, decided in bank, and in the sense of the

order the decision was final when filed. Besides, there was no petition for a rehearing or motion for a new trial by this appellant in that case, and it was certain the respondent therein, the prevailing party, would not so move or petition; and we think the appellant should have construed the order as we do—to give her forty days, commencing with the filing of the decision on the 8th of August, within which to file her transcript.

But, although there has been a failure on the part of appellant to comply with the rule and orders of the court as to the time of filing her transcript, we are not inclined, in view of all the circumstances of the case, to deny her a hearing on the merits of her appeal. We are satisfied that her counsel has acted in good faith upon his mistaken construction of the order extending time. The transcript was actually served on respondent within ten days after the time allowed by the order, strictly construed. No material delay will be occasioned in the hearing of the appeal, and respondent has been put to no costs or other inconvenience; and, since the enforcement of the rule is within our discretion, we shall deny the motion. It is so ordered.

We concur: Temple, J.; Henshaw, J.

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## TAUSSIG et al. v. BODE & HASLETT.*

S. F. No. 1572; March 1, 1901.

64 Pac. 108.

**Warehousemen—Loss by Leakage.**—Barrels of spirits were in apparently good condition when received at defendant's warehouse for storage. Six weeks later defendant discovered they were leaking, and immediately notified plaintiff, who found excessive loss by leakage. The evidence showed that the leakage was caused by defective cooperage, but there was no evidence that the barrels were improperly piled, or that the warehouse was improperly constructed, or subject to improper drafts by winds or otherwise, or that it was

*For subsequent opinion in bank, see 134 Cal. 260, 86 Am. St. Rep. 250, 54 L. R. A. 774, 66 Pac. 259.

defendant's duty to continuously inspect them, or that there was any such usage among warehousemen. Held, insufficient to support a verdict that the loss was due to defendant's negligence.[1]

APPEAL from Superior Court, City and County of San Francisco; William R. Daingerfield, Judge.

Action by Rudolph Taussig and others against Bode & Haslett, a corporation. From a judgment for plaintiffs and an order denying a new trial defendant appeals. Reversed.

Geo. T. Wright for appellant; Reinstein & Eisner for respondents.

PER CURIAM.—Action to recover damages for loss from sixty-four barrels of spirits deposited in defendant's warehouse. The case was tried before a jury. Plaintiffs recovered a verdict. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order denying the defendant's said motion. It is claimed by defendant, and we think correctly, that the evidence is insufficient to justify the verdict. The defendant is and was at all the times mentioned in the complaint engaged in the business of keeping a bonded warehouse. It is alleged in the complaint that about the twentieth day of January, 1896, the defendant, for hire, received on storage from plaintiffs sixty-four barrels of spirits, for the purpose of safely storing and keeping, and returning the same upon demand; that "defendant did not well or safely or properly store, handle, keep or return said barrels or packages, and said spirits contained therein, but, on the contrary, said defendant improperly, carelessly and negligently stored, handled, and kept said barrels or packages and said spirits, and in consequence of said carelessness and negligence, and of said improper handling and storage of said barrels or packages, . . . . a large quantity of said spirits was permitted to leak out of said barrels, and to become lost and destroyed."

The plaintiffs having alleged damage by reason of the negligence of defendant, the burden was upon them to prove such negligence affirmatively: Shear. & R. Neg., 5th ed., sec.

[1] Cited in the note in 136 Am. St. Rep. 212, on the duty of warehousemen in the care of property.

57; Schouler, Bailm. & Carr., 3d ed., sec. 23; Jackson v. Sacramento Valley R. R. Co., 23 Cal. 269.

The evidence is substantially without conflict, and shows that on the twentieth day of January, 1896, the spirits arrived at defendant's warehouse, and, upon notification being made to them, plaintiffs sent their agent to inspect the goods. After such inspection the agent reported to defendant that the lot was in proper condition to be piled, and the barrels were at once piled by defendant in the usual method followed by it. The method of handling the barrels and of piling them was shown to be proper. They were stored two tiers in height, and dunnage, or strips of wood, placed between the first bilge hoop and the second bilge hoop for the barrels to rest upon. On March 4, 1896, the defendant for the first time discovered that some of the barrels were leaking, and immediately telephoned to plaintiffs. Plaintiffs went to the defendant's warehouse, and upon receiving the sixty-four barrels found that eight of them showed excessive loss by leakage. One barrel was practically empty, three or four leaking pretty badly, and the others leaking to some extent. The total amount of leakage over and above the ordinary allowance for evaporation was one hundred and eighty-one and one-half running gallons, or two hundred and twenty-five and one-half proof gallons, of the value of $434.50. The plaintiffs immediately sent Nyland and Herbert, two competent parties, to examine the barrels, to determine as to whether or not the cooperage was defective. The witness Nyland testified: "I took the head out of the barrels, and found they didn't have as much glue in as other barrels had. . . . . I found four or five of the joints that were caulked with a kind of string, something like a lamp wick, the same as they use around distilleries and warehouses, and around places where there are leaky joints. . . . . The glue in the barrel stuck in most places, in what I call the most defective places. From my knowledge as an expert, the fact that the gluing did not stick in some places would account to a great extent for the leakage from that barrel." The witness Herbert testified: "The packages I saw needed driving very much. They were shrunk. I could tell from my examination whether the wood from which they were made was or was not properly seasoned. It was not well seasoned. A barrel that was made of such wood as that would be dangerous, and likely to shrink

and cause leakage. I did not make any examination of the inside of those barrels at that time, but about that time I examined the inside of four of them that had the heads out. I found that they were not properly glued." The evidence further shows that defendant, during the two years prior to the trial, had on storage in the same warehouse over eighteen thousand packages, and, except the leakage complained of in this action, there was no other leakage in excess of the government allowance, which is known as the "Carlisle" allowance.

The above evidence not only fails to show any act of negligence on the part of defendant, but shows that the leakage was the result of the defective cooperage of the barrels from which the leakage occurred. It is claimed that the fact that defendant did not inspect the barrels and endeavor to discover leakage is evidence of negligence. The evidence shows that the barrels were in apparently good condition when received by defendant and placed in its warehouse, and that they remained there only about six weeks. It further shows that in such case there should be ordinarily no leakage. There is no evidence tending to show that it was the duty of defendant to continuously watch and inspect the barrels, or that there is any such usage among warehousemen. The defendant was required to use ordinary care. It was required to use such care and diligence as prudent persons in the same class of business are wont to exercise toward such property or in the management of their own property under like circumstances.

It is further claimed that the two rows of barrels were piled chine to chine, with not sufficient space between them to admit anyone going in between the rows to inspect the ends of the barrels. It does not appear that it is the usage or custom for warehousemen to pile barrels with space sufficient to go between the rows. In fact, the witness Robin testified that he was familiar with the custom of storage of spirits in the bonded warehouses in San Francisco, and that in some of the warehouses they packed the barrels chine to chine. There is no evidence that the warehouse was improperly constructed, or subject to improper drafts by north winds or otherwise. The rule invoked by plaintiffs that a prima facie case is made out against a warehouseman who refuses to deliver property stored with him upon proof of

demand and refusal to deliver, and that the burden is then shifted upon the warehouseman to account for the property, does not apply to the facts of this case. Here there was no refusal to deliver the identical barrels that had been stored. The plaintiffs received the barrels. The leakage had occurred while they were on storage. The question was as to whether the leakage was caused by defendant's want of ordinary care. We cannot say as a matter of law that it was want of ordinary care in defendant not to inspect the separate barrels for six weeks. It would seem to us that if the barrels were properly made, for the purposes for which they were used—the holding of spirits—and were in good condition on the twentieth day of January, 1896, and properly stored in the warehouse, the presumption would be that they would not leak out their contents by the 4th of March, 1896. All the above facts are shown to be true by the record, except that the barrels were properly made. It appears that they were not properly made, and the defective cooperage must have been the cause of the leakage. It is unnecessary to discuss the other questions raised in the record. The judgment and order are reversed.

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## NEWHALL v. HATCH et al.*

S. F. No. 2407; March 11, 1901.

64 Pac. 250.

**Mortgages—Foreclosure—Limitation—Estoppel.**—A foreclosure suit was based on the liability specified in the mortgage, and not on a new promise to pay the debt, made before it became barred by the limitation, and before a judgment lien on the premises was created. A demurrer by the judgment creditor was sustained on the ground that the debt was barred, and, plaintiff declining to amend, judgment dismissing the action was entered, after which the creditor, relying on the allegations of the complaint, purchased the property on execution sale under the judgment, without notice of any renewal. Held, in a subsequent suit to foreclose the mortgage, in which plaintiff relied on a new promise, that he was estopped from maintaining the action.

*For subsequent opinion in bank, see 134 Cal. 269, 55 L. R. A. 673, 66 Pac. 266.

APPEAL from Superior Court, Alameda County; S. P. Hall, Judge.

Action by George A. Newhall against A. T. Hatch and others. From a judgment for plaintiff and an order denying a new trial defendant Sherman, Clay & Co. appeals. Reversed.

F. A. Berlin for appellant; E. W. McGraw and Craig & Craig for respondent.

HAYNES, C.—The facts can best be stated historically, with such reference to the pleadings as may be necessary. On November 3, 1892, defendant Hatch and wife mortgaged to the plaintiff certain real estate situated in Alameda county. The instruments constituting the mortgage consisted of a deed in form absolute, executed by Hatch and wife, and a defeasance executed by Newhall, the body of which, after reciting the deed, was as follows: "And whereas, said deed is absolute in form, yet in fact is intended as security for the payment of the sum of $4,000 loaned by said Newhall to said A. T. Hatch: Now this defeasance witnesseth that the said George A. Newhall, for himself, his heirs, executors, administrators, and assigns, hereby binds himself and agrees to reconvey the hereinabove mentioned and described property unto the said A. T. Hatch, his heirs, executors, administrators, or assigns, at any time upon the payment to him of said sum of $4,000.00 and his demand for a deed to said property." On April 21, 1896, Sherman, Clay & Co., the appellant herein, obtained a judgment against said A. T. Hatch in the superior court of Alameda county for the sum of $47,792.25, which was then docketed, and became a lien on said mortgaged premises. On February 3, 1897, Newhall commenced an action to foreclose his said mortgage lien, and made Hatch and wife, Dalton, the assignee of Hatch in insolvency, and Sherman, Clay & Co. defendants, alleging as to the latter that it had, or claimed to have, some lien thereon, but which was subsequent and subject to said lien of the plaintiff. In said first action the complaint set out the defeasance hereinbefore quoted, and alleged: "That no part of said sum of $4,000 has been paid, nor has any interest thereon been paid, but the whole thereof, with interest from Novem-

ber 3, 1892, is now due and owing by said Hatch to the plaintiff herein." Sherman, Clay & Co. demurred to said complaint, and, among other grounds, specified that the cause of action was barred by the provisions of section 337 of the Code of Civil Procedure. Said demurrer was sustained, and, the plaintiff declining to amend, judgment that his action be dismissed as to Sherman, Clay & Co. was entered on April 27, 1897, and from that judgment Newhall appealed, and this court affirmed the judgment: Newhall v. Sherman, 124 Cal. 509, 57 Pac. 387. After said judgment was entered against Newhall in the superior court, Sherman, Clay & Co. took out execution upon its judgment against Hatch, and on July 22, 1897, the sheriff sold said premises to said Sherman, Clay & Co., and, no redemption having been made, it received the deed of the sheriff therefor on July 28, 1898, and recorded it August 5, 1898. Thereafter, on June 27, 1899, said Newhall commenced the present action to foreclose his said mortgage upon the same premises, and again made the corporation known as Sherman, Clay & Co. a party defendant. The making of the deed and defeasance was alleged as before, but it was also alleged as follows: "That thereafter, on September 20, 1895, and long prior to the accruing of the claim of Sherman, Clay & Co., hereinafter mentioned, the said defendant A. T. Hatch made and subscribed in writing a new promise to pay the indebtedness secured by said mortgage, which new promise is in the words and figures following, to wit:

"'San Francisco, September 20, 1895.

"'$50,000.

"'One day after date, without grace, I promise to pay to the order of George A. Newhall, fifty thousand dollars, for value received, with interest at 7 per cent per annum from date until paid; both principal and interest payable only in United States gold coin.

"'A. T. HATCH.'

"And plaintiff alleges that the $4,000 secured by the mortgage aforesaid was a portion of the $50,000 agreed to be paid by said Hatch by the promissory note aforesaid; that no part of said sum of $4,000 has been paid, nor has any interest thereon been paid, but the whole thereof, with interest from September 20, 1895, is now due and owing by said Hatch to the plaintiff herein."

The complaint further alleged that Sherman, Clay & Co. claimed some interest or lien upon the premises arising out of a judgment obtained and docketed against Hatch in the superior court of Alameda county on April 21, 1896, for the sum of $47,792.25, but that the same was subsequent and subordinate to said mortgage. Sherman, Clay & Co. demurred to said complaint for want of facts, also that the alleged cause of action is barred by certain specified provisions of the Code of Civil Procedure, and also demurred severally on the grounds of ambiguity, uncertainty and that the complaint is unintelligible, and, these demurrers having been overruled, answered, and put in issue all the material allegations of the complaint, and alleged the recovery of said judgment against Hatch, the sale of the premises described in the complaint on July 22, 1897, upon execution issued upon said judgment, that it became the purchaser and received a certificate of purchase, that the property sold was not redeemed, and on July 28, 1898, the sheriff executed and delivered a deed to said corporation therefor. Said defendant corporation also pleaded the former judgment of the superior court, and its affirmance in this court. A trial was had upon said issues, and the court found the facts as hereinbefore recited, and further found that the only question considered or decided in said first action was that plaintiff's cause of action appeared to be barred by section 337 of the Code of Civil Procedure, and that that was the only question considered by the supreme court; that at the commencement of this action Sherman, Clay & Co. was the owner of the property described in the complaint, subject to plaintiff's said mortgage, and that said former judgment is not a bar to this action; "that in this action an issue is presented as to a new promise made by Hatch before the mortgage aforesaid became barred to pay the debt thereby secured, which issue was not presented in said former action, and was not therein adjudicated." To these findings was added a conclusion of law that plaintiff have judgment of foreclosure, and from said judgment, and from an order denying its motion for a new trial, said defendant Sherman, Clay & Co. appeals.

Respondent contends that "the $50,000 note given by Hatch to plaintiff in 1895 kept the mortgage alive." As between Hatch and Newhall, the mortgagor and mortgagee, that proposition is conceded. It was decided in Southern Pac. Co. v.

Prosser, 122 Cal. 413, 55 Pac. 145, cited by respondent, that a promise to pay the debt, made before it became barred by the statute of limitations, interrupted the running of the statute as to the debt, and kept alive the mortgage security. But this conclusion was carefully restricted by the qualifying words, "as between the parties." That case, therefore, does not decide the question here presented. In Wood v. Goodfellow, 43 Cal. 185, where it was claimed that the absence of the mortgagor from the state suspended the running of the statute of limitations, this court said: "So long as he [the mortgagor] retained the equity of redemption, and no other rights had intervened by reason of subsequent liens or encumbrances, he had the power by written stipulation under the statute to extend the time within which the debt should not be barred, or he might suspend the running of the statute by his absence from the state. So long as his rights only were to be affected, it was within his power to suspend the operation of the statute either by a written stipulation or by absenting himself from the state. But this court has repeatedly decided that, as against subsequent encumbrancers, or a subsequent holder of the equity of redemption, the mortgagor has no power, by stipulation, to prolong the time of payment, or in any manner increase the burdens on the mortgaged premises": See, also, the cases there cited. So, in California Bank v. Brooks, 126 Cal. 198, 200, 59 Pac. 302, 303, it was said: "The first mortgagee could not renew the note, and thereby extend the statute of limitations so as to affect the second mortgagee. He may take advantage of the statute of limitations, although the debtor does not; citing Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754; Barber v. Babel, 36 Cal. 11; Sichel v. Carrillo, 42 Cal. 493; Wood v. Goodfellow, 43 Cal. 185." See, also, Watt v. Wright, 66 Cal. 202, 205, 5 Pac. 91. In the case at bar, however, the new note or new promise was made on September 20, 1895, while the lien of the judgment of Sherman, Clay & Co. was not created until April 21, 1896, and at the time of said renewal the cause of action upon the liability specified in the defeasance and alleged by Newhall in his first suit was not barred by the statute. But his first suit was not commenced until February 3, 1897, and that suit, as we have seen, was based upon the liability shown by the deed and defeasance, and not upon the new promise set

up in the present action. At the time the first action was brought, Sherman, Clay & Co. had only a judgment lien upon the premises described in Newhall's mortgage, and by the judgment in that action it was declared that as against said lien the plaintiff's mortgage had ceased to exist. After the rights of the parties had thus been adjudicated, and long before the present action was brought, and without notice of said renewal, Sherman, Clay & Co. bought said premises at execution sale under its judgment against Hatch, and, no redemption having been made, received the sheriff's deed therefor on July 28, 1898, nearly a year before the present action was brought. No stronger assurance could have been given by Newhall to Sherman, Clay & Co. that neither the mortgage executed November 3, 1892, to secure the $4,000 money loaned, nor the time of payment thereof, had been in any manner changed, renewed or prolonged, than was given by his verified complaint in the first action, and his refusal to amend after the finding and judgment of the court that the mortgage he held was barred by the statute of limitations as against the judgment lien of Sherman, Clay & Co., set up in its answer. The new promise upon which Newhall now relies was known to him at the time his first action was brought; and if, by error of judgment, he relied, on his first action, upon the original promise, he should at least have informed Sherman, Clay & Co. of the fact of the renewal, and not have stood by with closed mouth, and permitted that corporation to purchase the property in reliance upon the representation, solemnly given in a judicial proceeding, of facts which on their face conclusively showed that his mortgage lien had expired, and that Sherman, Clay & Co. might safely purchase.

It is not necessary to discuss or decide the question whether the judgment rendered upon demurrer to the complaint in the former action, upon the ground that the mortgage lien was barred by the statute of limitations as against Sherman, Clay & Co., may be pleaded by that corporation as a technical bar to a new action to determine the priority of lien, the new action having alleged a new promise by the mortgagor, made before the first action was brought; since, if it is not a technical bar, the facts show an estoppel in pais, if not an estoppel by record. As already stated, at the time the first action was brought and determined by the judgment in the superior court, Sherman, Clay & Co. had only a judgment lien upon

the premises described in Newhall's mortgage; but, relying upon the allegations of plaintiff in his first complaint, which, in effect, negatived any renewal of the mortgage lien prior to the commencement of that action, Sherman, Clay & Co. purchased the premises discharged of any lien which may then have existed in favor of Newhall as against the mortgagor. The plaintiff knew of the renewal; the defendant Sherman, Clay & Co. did not, and had no means of knowing it. Even if said defendant had known of the execution of the $50,000 note made in 1895, that instrument would not have given any information that it included the $4,000 secured by said mortgage, or that it was a renewal of that or any other debt owing by Hatch to the plaintiff. Nor are there any controlling equities in favor of the plaintiff. The $4,000 secured by the mortgage in question was not loaned on the security of that mortgage. As shown by the testimony of the plaintiff, it was part of and included in a note for $50,000 made by Hatch to the plaintiff a year or more before the mortgage was given, and this mortgage was additional or collateral security for the amount thereof. The property was sold to appellant upon its bid of $3,000, and respondent suggests that, for anything the record shows, it may be worth a million; but the presumption from the record is that it brought its full market value.

There is no conflict in the evidence. The findings of fact are full, but there are mixed with them certain conclusions of law, as we have seen—as that appellant is the owner of the lands described in the complaint, "but subject to the plaintiff's mortgage." Eliminating these legal conclusions, the findings do not support the judgment, but require a judgment for the defendant Sherman, Clay & Co. I advise that the judgment and order be reversed, with directions to the court below to correct his conclusion of law, and enter judgment upon the findings for the appellant.

We concur: Gray, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed, with directions to the court below to correct his conclusion of law and enter judgment upon the findings for the appellant.

# BLOCK v. KEARNEY.

S. F. No. 1780; March 12, 1901.

64 Pac. 267.

**Judgment.—Where on a Motion to Set Aside a Judgment there is no affidavit of merits, the ground of mistake and excusable neglect cannot be considered.**

**Forcible Entry—Setting Aside Judgment.—Under Code of Civil Procedure,** section 475, providing that the court must disregard any error or defect which does not affect the substantial rights of the parties, the fact that a summons in unlawful detainer alleges that plaintiff seeks to recover the amount claimed "in U. S. gold coin," while the complaint prays only for an ordinary money judgment, is not ground for setting aside a judgment entered in accordance with the prayer of the complaint, since the error is immaterial and could not harm the defendant.

**Forcible Entry—Service of Process.—Under Code of Civil Procedure,** section 410, providing that, when a summons in unlawful detainer is served by a person other than the sheriff, it must be returned with an affidavit of service by such person, it is not necessary that it should appear that the party making the service did so at the request of the plaintiff or his attorneys.

**Unlawful Detainer.—Where a Judgment in Unlawful Detainer Purports to have** been rendered in open court, it cannot be attacked by an affidavit of counsel that it was in fact rendered in the judge's chambers, adjoining the courtroom, the door being open between the rooms.

**Unlawful Detainer.—Where, in an Action of Unlawful Detainer, Plaintiff** has recovered by way of penalty three times the amount of rent due, it would not be proper to also allow him damages for a frivolous appeal.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Leo Block against Peter A. Kearney. From a judgment for plaintiff and an order refusing to set aside the judgment defendant appeals. Affirmed.

R. M. F. Soto (N. Hamilton of counsel) for appellant; Edmund Tausky and Wallace A. Wise for respondent.

SMITH, C.—Appeals from a judgment for the plaintiff in a suit for unlawful detainer, and from an order refusing to set aside the judgment. One of the grounds of the motion

to set aside the judgment is mistake and excusable neglect, etc.; but as there is no affidavit of merits, this ground cannot be considered. The other grounds, which are equally involved in the appeal from the judgment, are (1) the insufficiency of the summons; and (2) of the proof of service; and (3) that the judgment was not rendered in open court. None of these grounds can be sustained.

1. The only objection to the summons that need be considered is that it states, in referring to the relief sought, that the plaintiff seeks to recover the amount claimed "in U. S. gold coin," whereas the complaint prays only for an ordinary money judgment. This was doubtless erroneous, but the error was corrected by the complaint, which was attached, and the judgment was rendered in accordance with the prayer of the complaint. The error was immaterial, and could not have harmed the defendant: Code Civ. Proc., sec. 475.

2. As to the proof of service, the objection is that it does not appear "that the party making the service did so at the request of the plaintiff or his attorneys." But it was unnecessary that it should do so: Code Civ. Proc., sec. 410.

3. The judgment purports to have been rendered in open court; but it is stated in the affidavit of plaintiff's counsel, in the bill of exceptions, that it was in fact rendered in the judge's chambers, adjoining the courtroom, the door being open between the rooms. I do not think, however, that the judgment can be attacked in this way. Nor is there any reason why the court may not hold its sessions, when it has been so ordered, in any room of the courthouse, or elsewhere, provided it conforms to the requirements of the law: Code Civ. Proc., secs. 73, 142, 144.

The respondent asks that damages may be allowed for frivolous appeal. But as he has already recovered, by way of penalty, three times the amount of rent due, we do not think it would be proper to grant such relief. The judgment and order should be affirmed.

We concur: Cooper, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## SPRINGER v. SPRINGER et al.

L. A. No. 756; March 21, 1901.

64 Pac. 470.

**Cancellation of Deed—Unsound Mind.—Plaintiff Deeded a lot** to her son, retaining a life estate therein. In an action by her to cancel the deed, the attorney drawing it testified that at the time of executing it her mind was sound. There was no evidence that she was of weak intellect, though she was old and in feeble health. Held, that a finding that she was of sound mind will not be reversed.

**Appeal.—Where the Evidence was Conflicting,** a finding for defendants will not be disturbed on appeal.

**Cancellation of Deed.—Where Plaintiff Conveyed a Lot to Her Son,** and he conveyed it to his wife, in an action by plaintiff to cancel her deed to the son findings that his deed to the wife was for a valuable consideration, and also for love and affection, were not prejudicial to plaintiff, the court having refused to cancel plaintiff's deed.

**Deed.—Love and Affection is a Good Consideration** for a conveyance of land by a husband to his wife, and will support the conveyance.

**New Trial.—Where the Statement on a Motion** for a new trial certified by the judge contained a summary of the evidence, but made no mention of any exceptions to evidence or other errors of law alleged to have occurred at the trial, and excepted to by plaintiff, plaintiff's remedy is not by motion to the trial court to amend the statement, but by petition to the appellate court.

**New Trial.—Where, on Appeal from an Order Denying** a new trial, the statement as certified by the trial judge contained a summary of the evidence, but made no mention of any exceptions to evidence or other errors of law alleged to have occurred at the trial, and excepted to by plaintiff, such exceptions and errors cannot be considered.

APPEAL from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Maria C. Springer against A. J. Springer and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

W. W. Holcomb and W. T. Williams for appellant; Geo. P. Adams for appellees.

CHIPMAN, C.—Action to have certain deeds declared void and canceled, and for the reconveyance of the property to plaintiff. Defendants had judgment, from which and from an order denying her motion for new trial plaintiff appeals.

1. Plaintiff contends that the evidence does not support the finding that she was of sound mind when she executed the deed sought to be set aside, and that she knew that she was making a deed when she executed it. Plaintiff is an elderly widow, and is the mother of defendant Andrew J. Springer and of Edward Springer. Defendant Rosa Springer is the wife of Andrew. The court found that on May 11, 1895, and for some time prior thereto, plaintiff was the record owner of lot 22 of the Aurora tract, in the city of Los Angeles, but that her son Andrew had an equitable interest therein; that, at the time the lot was purchased, her two sons, Andrew and Edward, purchased said lot 22, and also lot 31 in the same tract, but the title to lot 22 was taken in plaintiff's name and the title to lot 31 was taken in Edward's name; that the purchase price was contributed by each of said plaintiff's sons and by plaintiff, and thereafter and prior to May 11, 1895, plaintiff and her said sons built a house on said lot 22, and each contributed to pay therefor. Defendant Rosa was not the wife of Andrew until some time after plaintiff had conveyed to Andrew. The court found that on May 5, 1895, plaintiff was, and had been for some time, sick and in feeble health; that she stated to her son Andrew "that she was about to die, and informed him that she desired to make her last will and testament to said lot 22 to and in his favor." The court further found that subsequently, to wit, on May 11, 1895, plaintiff and defendant Andrew went "to the office of a notary public who was also an attorney at law, and plaintiff and her said sons, Andrew and Edward, thereupon agreed upon a settlement of and settled their respective interests in and to all the said real estate, as follows, to wit: Said defendant A. J. Springer transferred said lot 31 to said Edward Springer in full of all the latter's interest in all of said property. Plaintiff reserved to herself a life estate in said house and lot known as lot 22, in full of all her interest in all of said property; and she transferred to defendant A. J. Springer, subject to her said life estate, in full of all his interest in all of said property, the said house and lot known as said lot 22, and in pursuance

thereof she executed and delivered to defendant A. J. Springer a deed thereto, which is . . . . the deed sought to be set aside in this action; that at the time plaintiff executed and delivered said deed . . . . she was of sound mind; that she did not read said deed, but that said notary public who drew it read portions of it to her, and explained to her that she was thereby conveying by deed to defendant A. J. Springer the absolute title to said property, subject only to her said life estate, and she then and there fully understood, and ever since has understood, the same, and that she was so conveying it to her said son A. J. Springer, and that it was not a will nor a testament." The court further found that no mistake was made by plaintiff, and none was discovered; that on August 1, 1897, plaintiff asked defendant A. J. "to return said property, and he promised to, but did not, do so; that on August 4, 1897, for a valuable consideration, defendant A. J. Springer executed and delivered to his wife, Rosa M. Springer, his codefendant, a deed conveying said lot 22 to her." These deeds were duly recorded. The court also found that the conveyance to Rosa was "in consideration of the love and affection of her said husband, without notice of any equity or interest in favor of plaintiff, except said life estate." The testimony given by the sons was that they deliberately deceived their mother, pursuant to a previous understanding between the sons to do so, and they testified that they made her believe she was executing her will, and not a deed. She testified that she understood she was signing a will. Andrew testified that he explained to his wife, when the latter asked him to convey the property to her, that he could not do so, as it belonged to his mother; but this, his wife testified, was not true. At the trial defendants were living separate and apart. Plaintiff and her two sons testified that they did not know the difference between a will and a deed. Friend E. Lacey, the notary who prepared the deeds, a practicing lawyer at the Los Angeles bar, testified fully to the transaction. Having explained that the brothers came to him to prepare a deed from Andrew to Edward for lot 31, and to prepare a deed similar in form, but reserving a life estate in plaintiff from her to Andrew of lot 22, the witness stated with much particularity what took place at his office when afterward the brothers and their mother came to execute the deeds. It would serve no useful purpose to quote

at length this testimony. The facts narrated by this witness were sufficient to justify the finding that plaintiff understood perfectly what she was doing when she signed and acknowledged the deed, for Lacey carefully explained its contents and meaning to her. He also testified that he had known plaintiff well for several years, and had attended to business for her, and that at the time she executed the deed her mind was sound. There is no evidence that plaintiff was of weak or of impaired intellect, and the only reason now urged to show that she was of unsound mind is that the court found her to be advanced in years and weak in body. No presumption of impaired intellect can arise alone from impaired bodily health, and besides all the direct evidence was against any such presumption. There is a clear conflict in the evidence. The court manifestly believed the witnesses Lacey and Rosa Springer, and disbelieved the witnesses for plaintiff; this the court had a right to do, and with its conclusions upon this branch of the case we cannot interfere.

2. It is claimed that the finding that the deed to Rosa was for a valuable consideration is unsupported. The evidence was that the consideration was love and affection alone, and the court also so found. Appellant was not injured by these findings, inasmuch as the court found on sufficient evidence that plaintiff's deed to Andrew conveyed plaintiff's interest in the property. Andrew could and did convey whatever interest he acquired for the consideration of love and affection, which was a good consideration, and it is immaterial whether the consideration was valuable. The court found, on sufficient evidence, that plaintiff was not imposed upon in making her deed, but understood what she was doing, and intended to do just what she did. The finding that the deed was for a valuable consideration was without injury.

3. Much of the record is taken up with matter which the court refused to place in the statement on motion for new trial, and error is claimed on account of the refusal of the court to amend the statement as originally settled by the court. As we understand the record, this appeal is from the order denying plaintiff's motion to have certain facts set forth in the statement, alleged to be material, and which it is alleged were omitted or refused by the judge to be placed in the statement after his attention was called thereto, and before the final settlement. A counter-affidavit of defendants'

counsel disputes the correctness of some of the facts alleged by plaintiff to have occurred at the trial. The statement on motion for a new trial, as certified by the judge, is a summary of the evidence as shown by plaintiff's affidavits to have been adduced at the trial; but it makes no mention of any exceptions to evidence or other errors of law alleged to have occurred at the trial, and excepted to by plaintiff. The purpose of the proposed amendments seems to be not so much to enlarge the statement of facts, as to bring these exceptions to the attention of the appellate court for consideration. In effect, the purpose is to review the action of the trial judge in refusing to make the statement to fully and fairly represent the facts as they occurred at the trial. Plaintiff's remedy was by petition to this court: Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773, and cases there cited. This court can, on appeal, look only to the statement as certified by the judge: In re Gates, 90 Cal. 257, 27 Pac. 195. The judgment and orders should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## FEENEY v. HINCKLEY et al.*

S. F. No. 1485; March 22, 1901.

64 Pac. 408.

**Judgment—Limitation of Actions.—Under Code of Civil Procedure,** section 336, limiting the time within which an action on a judgment or decree must be brought to five years, no recovery could be had in an action on a judgment brought more than five, but less than six, years after judgment was entered; Code of Civil Procedure, section 1049, providing that an action is pending from its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied, not giving additional life to the judgment.

*For subsequent opinion in bank, see 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 589.

APPEAL from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Bridget Feeney against H. G. Hinckley and another. From a judgment in favor of defendants plaintiff appeals. Affirmed.

B. McFadden for appellant; Wm. H. H. Hart and Cotton & Cotton for respondents.

CHIPMAN, C.—Action to recover an unpaid balance due on a judgment rendered in an action of unlawful detainer. Defendants had judgment on demurrer to the complaint, from which plaintiff appeals.

The complaint showed that on August 22, 1891, plaintiff recovered judgment for possession of certain real property, and for $1,500 damages and $20.30 costs, and under a writ issued thereon September 1, 1891, and returned November 3, 1891, there was realized on the judgment $63.30, and that there is now unpaid on the judgment $1,457, with interest, etc.; and judgment is demanded against defendants for the amount. The action was commenced August 17, 1897—more than five, but less than six, years after the judgment was entered. Defendants demurred to the complaint for insufficiency of facts, and because the action is barred by section 336 of the Code of Civil Procedure, which provides that an action on a judgment or decree must be brought within five years. Appellant contends that the judgment was not a final determination as to the rights of the parties until the time for appeal had passed. Appellant lays much stress upon section 1049 of the Code of Civil Procedure, which provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." This section has no bearing upon the construction to be given section 336. For many purposes the action should be deemed to be pending until the right of appeal has elapsed, but it was competent for the legislature to prescribe the time within which an action might be brought to enforce the judgment, whatever might be the rights of the parties under section 1049. Appellant would read into the statute by construction a year's additional time, although the

statute plainly says that the action must be brought within five years. The court said in Rowe v. Blake, 99 Cal. 167, 33 Pac. 864: "The provisions of section 681 of the Code of Civil Procedure, limiting the issuance of an execution for the enforcement of a judgment to the term of five years, is but a limitation upon a certain mode for its enforcement, and does not purport to limit or qualify the right to its enforcement in any other mode. The right to bring an action upon a judgment or decree is recognized by that code as the subject of a civil action, and may be brought within five years: Code Civ. Proc., sec. 336. The provisions of this section are applicable to domestic judgments: Mason v. Cronise, 20 Cal. 211. And the time thus limited begins to run from the entry of the judgment: Trenouth v. Farrington, 54 Cal. 273." See Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218. If it be true, as claimed by appellant, that the question has never arisen in the precise form as in the present case, we think it beyond doubt that the judgment creditor who would seek to enforce his judgment by an action brought for that purpose must do so within the time limited by section 336, or the action will be barred. The judgment has no additional life given to it by section 1049, so as to enlarge the time within which he may have execution under section 681, nor within which he may bring his separate action as limited by section 336. The judgment should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## FOWLER et al. v. CARNE et al.

L. A. No. 913; March 29, 1901.

64 Pac. 581.

**Vendor and Vendee.—Where Plaintiff in an Action to Rescind** a contract for the purchase of land alleged that it was not worth more than $6,000, but introduced no evidence of its value, and defendant and several witnesses testified it was worth from $14,000

to $16,000, and that the shares of stock in a water company sold plaintiff was sufficient to water twenty acres in a year of ordinary rainfall, it cannot be contended that findings that it was worth $15,000, and that the shares of water stock were sufficient to irrigate twenty acres, were not supported by the evidence.

**Vendor and Vendee—Representations by Vendor.—Where Defendant Testified** that he did not represent that all of the land purchased by plaintiff was suitable for fruit-raising, except that part already planted to fruit trees, and that ten acres in addition to that under cultivation might be rendered suitable for cultivation by a small expenditure, a finding that defendant did not make such representation was supported by the evidence.

**Vendor and Vendee—Representations by Vendor.—Where Defendant Testified** that there were fourteen hundred and seventy-six trees on the land purchased by plaintiff, and the written contract specified that there were from fourteen hundred to fifteen hundred, a finding that defendant did not represent that there were sixteen hundred was supported by the evidence.

**Vendor and Vendee—Representations by Vendor.—Plaintiff Alleged** that defendant fraudulently represented that the shares of water stock sold plaintiff were sufficient to irrigate the entire tract purchased by plaintiff, and defendant denied that he represented that plaintiff's shares of water stock would entitle her to a sufficient amount of water to irrigate said lands, or any portion thereof except that part planted to fruit trees. Held, that allowing defendant to amend his answer after the trial by striking out the words, "or any portion thereof except that part planted to fruit trees," was not prejudicial to plaintiff, where the findings of the court supported the answer as it stood prior to the amendment.

**Vendor and Vendee.—Where Plaintiff in an Action to Rescind** a contract for the purchase of land alleged that it was worth only $6,000, but introduced no evidence of its value, error in the admission of evidence of value on the part of defendant was harmless, since the burden to show value was on plaintiff.

**Witness.—Where Witnesses as to the Value of Land** were qualified to give an opinion, the question what was the value of the land as "between a party who wished to buy and one who wished to sell" was not objectionable as to form.

APPEAL from Superior Court, Ventura County; W. S. Day, Judge.

Action by Laura E. Fowler and husband against John Carne and others. From a judgment in favor of defendants and from an order denying a new trial plaintiffs appeal. Affirmed.

Barnes & Selby and H. L. Poplin for appellants; Blackstock & Edwing for respondents.

GRAY, C.—This action was brought to rescind a contract of purchase and sale of a certain fruit ranch of about fifty-three acres, situated in Ventura county, together with fifty-five shares of water stock, and to compel defendant to give up for cancellation a note and mortgage for $12,000, given to secure the balance due under said contract, and to recover $3,000 and interest paid on said contract, and also the further sum of $3,000 and interest for the value of a dwelling built on said ranch by plaintiffs. The complaint alleges that plaintiff was induced to enter into the contract by the fraudulent representations of defendant. The defendant denied the fraud, set up the mortgage and note in a cross-complaint, and on a trial before the court without a jury had judgment in his favor on the issue of fraud, and also foreclosing the mortgage. From this judgment and from an order denying a new trial the plaintiffs appeal.

Laura Fowler and her husband and coplaintiff resided in Chicago, Illinois, and in July, 1898, they met the defendant Carne, who resided in Ojai Valley, Ventura county, California. Neither of plaintiffs knew anything about fruit farms or fruit farming in Ventura county, but they desired to purchase a fruit farm and live in California principally for the health of themselves and their two boys, and incidentally to profit by fruit farming. Accordingly, on making the acquaintance of defendant, they opened negotiations with him for the fruit ranch in controversy, which resulted in the contract now sought to be rescinded. Plaintiffs did not see the ranch, but took the defendant's word for everything. The representations of defendant claimed in the complaint to have been false, and on which plaintiff was induced to make the purchase, are as follows: (1) He represented that said lands and fifty-five shares of water stock were of the value of $15,000; (2) that said lands were in every way adapted, suited and capable of and for profitable growing of citrus fruits, especially lemons and oranges; (3) that twenty acres of the tract contained sixteen hundred trees, that would yield a crop worth net profit of $3,200 for the year 1899; (4) that the remainder of the tract, thirty-three acres, was in proper condition to put into orange and lemon culture, and just as good as the twenty acres already in trees and

bearing; (5) that the fifty-five shares of stock of the San Antonio Water Company, sold with the land, carried with it water ample and sufficient to irrigate the entire tract planted to fruit trees or any and all crops that would grow upon said lands; (6) that the lands were entirely free from freezing temperature in winter-time each year. As to all these alleged false and fraudulent representations the findings are adverse to plaintiff. Appellant's principal attack is directed against these findings. She contends that they are not supported by the evidence.

As to representation 1 above referred to, the finding is "that said realty and water stock at the time of the sale thereof to plaintiff Laura E. Fowler were of the value of $15,000." Plaintiff, in her complaint, alleged that this property "was not of a value to exceed six thousand dollars," but she introduced no evidence whatever as to its value. The witnesses for defendant gave their opinions as to its value, fixing it, most of them, from $14,000 to $15,000; one of them testifying that, in his opinion, it was at the time of the sale worth from $15,000 to $16,000. Certainly, this finding is supported by the evidence.

As to representations 2 and 4, the findings are "that it is not true that defendant Carne . . . . stated or represented . . . . that said lands, other than the twenty acres thereof planted to trees, and about ten acres in addition thereto, were in any way or at all adapted, suited, or capable of or for profitable growing of any citrus fruits." The court also finds that about ten acres in addition to the twenty acres already planted to trees could, by a small expenditure, be rendered fit for cultivation, and as good as said twenty acres; and that defendant did not represent that any of the tract not already planted "was in proper or any condition to put into orange or lemon culture." These findings find support in the testimony of defendant, and, so far as it relates to the condition of the ranch, his testimony is corroborated by that of other witnesses called in his behalf.

The finding as to representation 3 is to the effect that defendant made no such representation, but did represent that the twenty acre tract contained about fourteen hundred and seventy-six trees. This finding is also supported by defendant's testimony, which is corroborated by the written contract between the parties, in which the number of trees is

given as "between fourteen and fifteen hundred orange, lemon and other fruit trees." The evidence shows without conflict that this representation as to the number of trees did not differ materially from the true number.

As to representations 5 and 6, the findings are that they were not made, but it is, in substance, found that the water from said fifty-five shares is sufficient in a year of ordinary rainfall to properly irrigate the twenty acres set to trees, and that defendant so represented to plaintiffs. This finding is supported by the testimony of defendant and of several witnesses who gave their opinion, derived from experience, as to the amount of continuous flow of water in inches required to irrigate a certain number of acres on the tract in question. There was some conflict in the evidence on the question of the sufficiency of the water derived from these fifty-five shares to irrigate the twenty acres already planted; but it was for the trial court to sift this evidence, and find where the preponderance lay, and we are not prepared to say that the finding on the question was without warrant in the evidence.

As to many of the alleged false representations the trial court seems to have relied on the testimony of the defendant alone whenever it came into conflict with that of the plaintiffs. This, perhaps, arose from the fact that in an important particular already referred to the testimony of defendant was corroborated by the written contract made in Chicago on or about the same day as the alleged false representations. We have reference here to the testimony as to the representation concerning the number of trees. We cannot uphold appellants' contention that the findings on the subject of false representations are without support in the evidence; and, these findings being adverse to plaintiffs, it follows that the groundwork of their action is gone. It will, therefore, be unnecessary to inquire whether the other findings complained of are supported by the evidence.

Appellants, in their brief, complain of several errors of law, only two of which we will discuss. The first is that the court permitted the defendant to amend his answer by striking therefrom the words, "or any portion thereof other than said twenty acres planted to fruit trees," thereby changing an admission that defendant represented to plaintiffs that there was ample water to properly irrigate the twenty acres

in orchard each and every year into a denial of that fact. We think appellants misapprehend the effect of the amendment. To set them right, we quote the entire allegations of the complaint and answer pertinent to the question. The complaint is as follows: "That he had, and would sell with the said tract, fifty-five shares of the stock of the San Antonio Water Company, which shares of stock he stated and represented to plaintiffs carried and entitled the owner to water ample and all-sufficient to irrigate the said entire tract of land during the entire irrigating season of each year. . . . . That said tract was well and amply supplied with water for the proper and sufficient irrigation of the same planted to fruit trees, orange and lemon trees, and any and all crops that would grow upon said lands." The answer to the above allegations was as follows: Deny "that the defendant Carne stated or represented to plaintiffs, or either of them, that said shares of water stock carried or entitled the owner to water ample or sufficient to irrigate said tract of land, or any portion thereof other than said twenty acres planted to fruit trees, during the irrigating season of each year, or of any year other than one of ordinary rainfall; or that said lands, . . . . or *any portion thereof, other than said twenty acres planted to fruit trees,* was well or amply supplied with water for the proper or sufficient irrigation of the same planted to fruit, orange, or lemon trees, or any crops that would grow upon said lands, or at all." The part of the above quotation in italics was stricken from the answer on motion of defendant to amend some days after the trial and immediately before the findings were filed. An examination of the findings discloses that on this issue they follow the exact language of the answer as it stood before this amendment. The testimony of the defendant also supports the answer exactly as it stood before the amendment. He says: "I told them it was very dry at that very time, and that I had a letter from my son saying that it was dry, and the fruit was dropping. . . . . I explained to Mrs. Fowler and Dr. Fowler that the supply from this water stock, according to my experience, would be sufficient to irrigate the twenty acres in citrus fruits in a season of ordinary rainfall. . . . . I told them there was no water for citrus fruit on the ten acres; that all the water was used on this twenty acres, except for domestic use." There is no pretense that it was represented that water was to be

had for this ranch, or had ever been obtained for it, from any other source than from these fifty-five shares of water stock. We are therefore at a loss to understand why the defendant desired to amend his answer as he did, or of what benefit it could be to him to so amend it. So long as the evidence of defendant and the findings followed and supported the denials and allegations of the answer as it was before amendment, the amendment was entirely immaterial, and accomplished nothing. Besides, the amendment did not materially change the issues, and appellants were not injured thereby.

The second alleged error of law that we will notice is claimed to have been made in overruling plaintiffs' objection to evidence offered by defendant as to the value of the property sold. Though the plaintiffs alleged that this property was worth no more than $6,000—and the burden was undoubtedly on them to show that it was worth less than they agreed to pay for it, in order to show that they were injured by the alleged false representations—yet, as we have already seen, they offered no proper evidence as to the value of the property whatever. Therefore, if the defendant had presented no evidence on the question of the value of the property, the finding on that subject must have been adverse to the plaintiffs, or just as it now stands, to wit, that the property was worth $15,000, the amount for which it sold. The evidence as to value in no way affected the findings. They are the same as they would have been in the absence of such evidence. Therefore the plaintiffs are in no way injured by the evidence complained of. Again, all the witnesses who testified to this question of value showed themselves, either in direct or cross examination, to be competent to give an opinion thereon. The form of the question —it being directed to the value of the property "between a party who wished to sell and one who wanted to buy it"—is not open to objection: Lawrence v. City of Boston, 119 Mass. 126.

The further contentions of appellants are not of sufficient importance to require special discussion. The judgment and order should be affirmed.

We concur: Haynes, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## GARNER v. JUDD.*

S. F. No. 2361; May 4, 1901.

64 Pac. 1076.

**Administrator—Father of Illegitimate.**—Under Civil Code, section 230, providing that the father of an illegitimate child, by publicly acknowledging it as his own and receiving it into his family, adopts it and makes it, for all purposes, legitimate from the time of its birth, the acknowledging of an illegitimate child by a father without receiving it into his family is not sufficient for its adoption, and such child can confer no right to administer her father's estate.[1]

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Proceeding by Georgina Garner, in the matter of the estate of William Goodman, deceased, for letters of administration, against A. R. Judd. From a judgment in favor of petitioner and an order denying a motion for a new trial defendant appeals. Affirmed.

Henry L. Ford, E. M. Frost and L. M. Burnell for appellant; Mahan & Mahan for respondent.

McFARLAND, J.—This is a contest for letters of administration of the estate of William Goodman, deceased, between Georgina Garner, a niece of defendant, and A. R. Judd, who claims under a written request of one Maggie Goodman-Phillips, an illegitimate daughter of decedent. Judgment

*For subsequent opinion in bank, see 136 Cal. 394, 68 Pac. 1026.

1 Cited, with approval, in connection with the enforcement of a statute in Oklahoma similar to the California statute, in Allison v. Bryan, 21 Okl. 563, 17 Ann. Cas. 468, 18 L. R. A., N. S., 93, 97 Pac. 284. That was an application, by way of habeas corpus, by the mother of the child for its custody; and the question arising whether a man can be said to receive a child into "his family" without its being made to appear affirmatively that the woman he is living with is his wife, the court's opinion was that his holding out such woman to be his wife was sufficient.

Cited, with approval, in Allison v. Bryan, 21 Okl. 564, 18 L. R. A., N. S., 93, 97 Pac. 284, and discussed at length, particularly in respect of the necessity of a reception by the father into his home.

went for Garner, and from the judgment and an order denying a motion for a new trial Judd appealed.

The only question in the case is whether or not the said Maggie was adopted and rendered legitimate under the provisions of section 230 of the Civil Code, which is as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such a child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Maggie was the illegitimate daughter of an Indian woman named Mary; and the court found that at the time of her birth, in 1878, and from 1874 to 1879, the decedent, Goodman, had a family, and was living with his family, and with another Indian woman, named Annie, as his wife; that he acknowledged Maggie as his child, "but he did not receive her as such into his family, or otherwise treat her as if she was a legitimate child during her minority." It is quite clear that the evidence supports the finding that "he did not receive her as such into his family" during her minority, and, this being so, the judgment must be affirmed. Section 230 applies only to minors: In re Pico's Estate, 52 Cal. 84. It is contended that the findings that Goodman had a family and lived with Annie as his wife are unwarranted by the evidence, but we need not inquire into the correctness of these findings. If he had a family, then he must have received Maggie into it, in order to adopt her under section 230. If he had no family, then the section had no application to the case. If he had no family, of course, he did not take her into it, and therefore did not comply with the section in question. Whether or not an unmarried man can establish a family, within the meaning of the code, by taking an illegitimate child to live with him in a home provided for that purpose, is a question not here involved. If a man who has no family, and makes no attempt to have one, desires to adopt an illegitimate child, he can do so by a written acknowledgment under section 1387 of the Civil Code, and not otherwise. There can be no compliance with section 230 in the absence of the conditions contemplated by that section, and absolutely necessary to give it effect. There is nothing contrary to this conclusion decided

in Blythe v. Ayers, 96 Cal. 552, 19 L. R. A. 40, 31 Pac. 915. The part of the opinion in that case relied on by appellant was concurred in by only three of the judges participating in the decision, and was dissented from by the others, and the judgment was affirmed by the court upon the ground that there had been a compliance with section 1387. In Re Jessup's Estate, 81 Cal. 408, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028, there is an expression favorable to appellant's contention in an opinion concurred in by four of the justices; but that expression was entirely unnecessary to the decision of the case, and one of the four justices afterward expressed the opinion that it was erroneous. It cannot, therefore, be taken as authority on the question: See Blythe v. Ayres, 96 Cal. 593, 19 L. R. A. 40, 31 Pac. 915. The judgment and order appealed from are affirmed.

We concur: Temple, J.; Henshaw, J.

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## PAINTER'S EXECUTORS v. PAINTER et al.

S. F. No. 1971; May 25, 1901.

65 Pac. 135.

**Partnership—Accounting.—Where a Surviving Partner Carried** on the firm business with the firm assets until it was terminated by the appointment of a receiver, an accounting should be as of the date of the appointment of the receiver, and a personal judgment against the surviving partner, which merely fixed his liabilities as of the date of the deceased partner's death, was erroneous.

**Partnership—Death of Partner.—Where the Assets of a Partnership Dissolved** by the death of one of its members were used by a new firm formed by the surviving partner, the old partnership was entitled to a share in the profits of the new firm proportionate to the value of the assets of the old firm used, as compared with the value of the property or services contributed by the new firm; but all the property of the new firm should not be regarded as assets of the old.

APPEAL from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Jerome B. Painter's executors against Theodore P. Painter and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Pringle & Pringle for appellants; M. B. Kellogg for respondents.

PER CURIAM.—Appeal from a judgment for plaintiffs and from an order denying the defendants a new trial. The case was before this court on appeal from a former judgment and similar order in favor of plaintiffs, and reversed, reported in 4 Cal. Unrep. 636, 36 Pac. 865. The case, stated generally, and so far as identical on the two appeals, or noting divergences, is as follows: The defendants and the plaintiffs' testator, Jerome Painter, were brothers, and at the time of the death of the latter he and Theodore were partners, under the firm name of Painter & Co., in the business of printing and of manufacturing type in the city of San Francisco. Jerome died February 6, 1883, and by his will the plaintiffs and the defendant Theodore were named as executors, and qualified as such; but the latter resigned May 3, 1888. On the death of Jerome the business and assets of the firm came to the hands of Theodore as surviving partner. But shortly afterward he formed a partnership with the defendant Milton under the firm name of Painter & Co., and thereafter the business of the old firm and that of the new was carried on under the same management, under the name of Painter & Co., up to May 17, 1889, when a receiver was appointed, who took possession of all the properties in the possession of the defendants as partners, whether of the old or of the new firm. Thus far the facts are undisputed. But it was found on both trials that after the defendants took possession the business was managed by them as if it were their own, and under claim to that effect; and in the findings on the last trial, now under review, it is found that this claim of defendants was based on a bequest in the will of Jerome (being the bequest referred to in Painter v. Painter, 113 Cal. 371, 45 Pac. 689); and that, under this claim, they continued, to the commencement of the suit, to hold the assets of the old firm, and to use them for their own benefit, or, more specifically, in "the conduct of the business of the old firm of Painter & Co., claimed by them as aforesaid"; and also that the defendant Theodore failed to keep the books of the concern correctly, or to keep a just or true account of its business, for the reason that the books have been kept by the new firm as accounts of their own; and that "such omission and neglect was not with fraudulent

intent, but was willfully and wrongfully careless and negligent." It was further found on the last trial—and, in effect, on the former—that the business continued to be the business of the old firm, and that all the properties in the hands of the defendants when taken from them by the receiver were the properties of the old firm. On the former trial it was found that the irregularities in the books were the result of fraudulent design of the defendants to cheat and defraud the estate; on the latter the findings negative the existence of fraud on the part of defendants. Otherwise, with regard to the facts found, the general case presented on the two appeals is substantially the same. But, with regard to the effect to be given to the facts, the conclusions reached by the court, and the judgments rendered in accordance therewith, are widely divergent; and, as one of the questions to be now determined is as to the effect of the former decision as the law of the case, a brief statement of the effect of the findings and judgments on the former trial will be necessary. On that trial the settlement of the accounts of the partnership was carried up to the date of the commencement of the suit, at which time the business of the old firm, as also that of the new, was terminated by the receiver taking possession of the assets of both; and in the findings there is contained a statement of the account of Theodore as of that date. This is based on a statement of the "resources and liabilities" made out by the plaintiffs' expert, and put in evidence by them, which may, therefore, be regarded as part of the finding. From this it appears that the net capital of the firm (the old and new firm being regarded as one) at the date of accounting ("assuming all resources as collectible," etc.) was the sum of $113,142.31, and the share of each $56,571.15; but that Theodore was to be charged with various amounts, to be deducted from his share, aggregating $67,246.19. These items (with the exception of two, amounting to $15,208.86) were charges against Theodore to correct credits in his favor on the books, found by the court to be unauthorized; and with reference to all of them this court on appeal held the findings not to be justified by the evidence. This (with the exception of the items specified) leaves the account as shown by the books. Another correction is, however, required with reference to a charge of $21,201.50, or more, credited on the books to Jerome as the purchase money of certain school lands,

which this court on the former appeal held to have been a private transaction of Jerome's, and therefore to be transferred to his personal account. With these corrections, as the result of the last trial and decision on appeal, we may assume the account thus corrected to be a correct, though not complete, exhibit of the state of the account between the partners.

The judgment entered by the court on the above data is, of course, on the present appeal immaterial. But it may be briefly alluded to as part of the history of the case, and as serving to illustrate the character of the judgment now before us on appeal. The result of the court's calculations on the former trial was to bring Theodore in debt to the firm, after deducting credits on the books, in the sum of $28,675.64. Judgment was accordingly rendered against him personally, and in favor of the plaintiffs, for one-half this amount, $14,337.82; and it was further adjudged that the balance of the net capital, $113,142.31, after deducting the amount of $28,675.64, in which Theodore was found to be indebted to the firm—being $84,466.37—should be divided equally between the parties. But among the resources of the firm going to make up the amount thus to be divided between Theodore and the plaintiffs it appears from the statement of resources and liabilities that there was an indebtedness of Jerome to the firm of $32,532.14, of which one-half would, under the judgment, belong to Theodore. The judgment for the division of the net capital was, therefore, in effect, a judgment that Jerome, or, rather, his executors, was indebted to Theodore in the sum of $16,276.57—an amount exceeding the amount of the judgment against the latter by $1,938.75. On the last trial, now under review, a different mode of settlement was adopted. No account was taken of transactions subsequent to the death of Jerome, nor was there any attempt to settle the accounts of the partners. All that is found is that at the date of the death of Jerome he was not indebted to the firm, and the net value of the firm's assets, over liabilities and exclusive of real estate, was $62,708.50, to which is added the sum of $2,740, in which Theodore is found to be indebted to the firm, thus making "the total net market value of the assets" $66,448.88; and for one-half of this—$33,224.44—judgment is rendered against Theodore personally and as surviving partner, to be satisfied by sale of his share of the assets, real and personal, and, if these be insufficient, a deficiency

judgment to be docketed against him. This was obviously erroneous. It is expressly found by the court that the business carried on after Jerome's death, with all its original assets and accessions and profits, was the business of the old firm; and Theodore was, therefore, entitled to an accounting up to the date of its termination by the appointment of the receiver. Until final settlement of the accounts, a personal judgment against a partner or surviving partner is erroneous: 2 Bates, Partn., secs. 919, 971, 974. Argument on this point is unnecessary; but the result of the mode of settlement adopted by the court may be illustrated by comparing it with the settlement made at the former trial. There, though Theodore was improperly charged with items amounting to $52,037.30, yet the result was a judgment against him of $14,337.82 only, less than one-half of the judgment rendered at the last trial on data precisely the same, except that the charges disapproved by this court on the former appeal were presumably omitted. For the reason given, the judgment must be reversed, and the cause remanded for new trial. There are however, other errors, which, with a view to the future proceedings in the case, must be adverted to.

1. In arriving at the conclusion that the value of the assets of the firm at the date of the death of Jerome was $66,448.88, and that his executors were entitled to one-half thereof, it was necessary for the court to assume that Jerome was not indebted to the firm in any amount when he died; and accordingly it is so found. But this finding is clearly in conflict with the statement of resources and liabilities made by the plaintiff's own experts, put in evidence by them, and accepted by the court on the former trial, wherein, among the resources of the firm, is a debit to Jerome's account of $32,532.14; and, in addition, it was held by this court on the former appeal that he had been improperly credited with large amounts for purchase money of school lands (amounting, according to the testimony of Folger, plaintiff's expert, to the sum of $21,201.50), which should have been charged to his personal account. Assuming these amounts to be correct, the indebtedness of Jerome to the firm at the time of his death was largely in excess of Theodore's, and the interest of the latter in the assets of the firm correspondingly greater than that of the former. What was the precise interest of Jerome in the assets of the firm at the time of his death is to be determined by the

lower court; but on the new trial the attention of the court should be directed to the claim of appellants that it in fact amounted to nothing, and to what is said by this court on the former appeal with reference to this claim, and as to the law applicable to the case if the claim should be found to be just. With regard to the judgment in the case of Painter v. Painter, 113 Cal. 371, 45 Pac. 689—which the court held to estop the defendants to claim that Jerome was in fact indebted to the firm at the time of his death—it is obvious that the finding cannot be sustained. Leaving out of view the objection that Theodore suffered default, and that there was no judgment against him, and consequently no estoppel, it is otherwise clear that neither he nor Milton was estopped. The indebtedness referred to in that suit was an alleged personal debt of Jerome to the firm, as distinguished from an indebtedness for money withdrawn from the firm, which could be determined only upon a final settlement of the partnership concerns. The findings of the court were carefully confined to indebtedness of the kind alleged. The settlement of the partnership accounts was involved only as incidentally necessary to the relief sought, which was a sale of lands. The court refused to entertain jurisdiction of, or to hear evidence on, that subject; and it was in fact formally admitted by the defendant's attorney that Jerome had withdrawn from the firm more than Theodore, or, in other words, was indebted on that account.

2. On the former trial the court found, in effect, that the appointment of a receiver was necessary to preserve the property, etc., and this court held on appeal that the finding was not supported by the evidence; yet on the present appeal we have the same finding. As the case is reversed on other grounds, we have not thought it necessary to examine the record critically, with a view of determining whether there is new evidence on this point materially affecting the case, though on such examination as we have made we have not been able to discover any. But the court on the former appeal also held that "the receiver should have been discharged," and this injunction has been disregarded by the lower court. On another appeal, a continuance of the receivership, unless the case be materially varied from what it was on the former appeal, may be a ground for reversal.

3. The court finds that all the property held by Painter & Co. (the new firm), including the Directory, belongs to the old firm. This finding, we think, is not sustained by the evidence. The firm of the defendants and the dissolved firm, though having the same name, are entirely distinct entities. The use of the assets of the old firm in the new business entitled it to a share in the profits, but not necessarily to an ownership of the assets acquired by the new firm; nor could it give it more than a part ownership of such assets, proportionate to the value of the assets of the old firm used, as compared with the value of the money or services contributed by the new firm. On this point, also, attention should be directed to what was said by this court on the former appeal.

4. There are other imperfections in the findings that may be briefly adverted to. The finding that the assets of the old firm were "appropriated by the defendants to their own use" is inconsistent with the finding of the court that their claim was based on the bequest in Jerome's will, and with the facts also found that an inventory and account were filed in the matter of his estate. Their claim was evidently in subordination to the title of Jerome's executors. The finding that the amounts collected by Theodore from old accounts and sales of stock of the old firm were expended by the defendants in the attempt to continue the business seems also to be in conflict with the evidence. A part of it—$10,000, and presumably more—seems to have been paid on the debts of the old firm. The judgment and order appealed from are reversed and the cause remanded for new trial, to be conducted in accordance with the principles stated in this and in the former decision of this court.

## MILLER & LUX v. KERN COUNTY LAND COMPANY.*

S. F. No. 1766; May 29, 1901.

65 Pac. 312.

**Venue—Change—Corporations—Injuries to Realty.**—Code of Civil Procedure, section 392, provides that actions for injuries to real property must be tried in the county in which the subject of the action is situated. Constitution, article 12, section 16, provides that a corporation may be sued in the county where the liability arises or the breach occurs, or in the county where it has its principal place of business. Action was brought against a corporation for injuries to real estate in the county where it had its principal place of business, which was other than that in which the land was situated. Held, that the provision of the constitution did not affect the code provision, and hence refusal to grant defendant's motion for a change of venue to the latter county was error.

APPEAL from the Superior Court, City and County of San Francisco; Edward A. Belcher, Judge.

Action by Miller & Lux (a corporation) against the Kern County Land Company (a corporation). From an appeal denying a motion for a change of venue defendant appeals. Reversed.

Page, McCutchen & Eells, for appellant; Houghton & Houghton and E. B. & Geo. H. Mastick for respondent.

GRAY, C.—It appears from the complaint herein that both the parties to the suit are corporations having their principal places of business in the city and county of San Francisco. The action was brought in said city and county to recover $25,000 on account of injuries to real estate situated in the county of Kern. It is alleged in the complaint that the plaintiff owns certain lands and an interest in the Buena Vista reservoir, which lands and reservoir are situated in said county of Kern; also that said plaintiff owns an interest in a certain ditch leading out of said reservoir and across said lands; and that defendant, with force and arms, and unlawfully and against the will of plaintiff, placed and maintained a dam in said ditch, thereby preventing the use thereof for

*For subsequent opinion in bank, see 134 Cal. 586, 66 Pac. 856.

the purpose of irrigating plaintiff's said land, to the damage of plaintiff in the said sum of $25,000. Defendant made demand and motion for a change of venue to Kern county, on the sole ground that, the action being for damages to real property, the case should be tried in the county where the property was situated. We think this motion should have been granted. Section 392 of the Code of Civil Procedure provides that "actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in this code: (1) For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property." It will be seen that the section is mandatory by its terms and unless it is controlled by, or is in conflict with, some provision of the constitution, the action "must be tried" in the county where the property is situated. Section 16, article 12, of the constitution, provides that "a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases." This provision of the constitution does not affect the code provision quoted. It relates to a different subject, and is not necessarily inconsistent with said code provision. The constitutional provision does not in express terms refer to actions for injuries to real estate or to actions concerning real estate. We cannot be permitted to infer that it was meant to include injuries to real estate in its provisions because it uses the phrase, "or where the obligation or liability arises"; for to indulge in such an inference would make it include actions for the enforcement of liens on real estate, to quiet title, etc., and render it inconsistent with section 5, article 6. It cannot be successfully contended that the two sections of the constitution referred to are not in harmony (Fresno Nat. Bank v. Superior Court of San Joaquin Co., 83 Cal. 491, 24 Pac. 157); and the same rule that would harmonize these provisions of the constitution, and give effect to both, would also harmonize the code provision with the quoted section of the constitution. In Griffin & Skelly Co. v. Magnolia &

Healdsburg Fruit Canning Co., 107 Cal. 378, 40 Pac. 495, the court, in speaking of section 16 of article 12 of the constitution, says: "This provision of the constitution is merely permissive to the plaintiff (Fresno Nat. Bank v. Superior Court of San Joaquin Co., 83 Cal. 491, 24 Pac. 157); and the provision therein that the court may 'change the place of trial, as in other cases,' indicates that it is no more controlling upon the action of the court than if it were a mere statutory enactment. Being a provision of the constitution, the legislature cannot deprive the plaintiff of the privilege which it confers, but he has not thereby received any greater privilege than if the same provision had been made by statute. In either case it is only a rule of procedure, to be acted upon by the court in connection with other rules of procedure."

The very question here involved has been determined in Drinkhouse v. Spring Valley Waterworks, 80 Cal. 308, 22 Pac. 252. As shown by the complaint in that action, the defendant had its principal place of business in the city and county of San Francisco, where the action was begun for injury to real estate situated in San Mateo county. The defendant moved to change the venue to San Mateo county, the motion was granted, and this court affirmed the order. It is true that no provision of the constitution is referred to in the opinion or cited in the briefs; but section 392 of the Code of Civil Procedure is referred to, and it is directly held that under that section the proper place for the trial of an action for injury to real property is in the county where such real property is situated. We should not presume that the court and counsel overlooked a provision of the constitution, but rather that they had it in mind, and saw no inconsistency between it and the code provision: Fresno Nat. Bank v. Superior Court of San Joaquin Co., supra. For the foregoing reasons, we advise that the order be reversed.

We concur: Cooper, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is reversed.

## LEIBBRANDT v. SORG.

S. F. No. 2241; May 29, 1901.

65 Pac. 318.

**Breach of Marriage Promise—Evidence.—Code of Civil Procedure**, section 1845, provides that a witness can testify to those facts only which he knows of his own knowledge. Held, that, in an action for breach of marriage promise, the admission of plaintiff's declarations to third parties, who were not invited to attend the wedding, and before any wedding day had been set, that plaintiff and defendant intended to marry, constituted prejudicial error.

**Breach of Marriage Promise.—The Fact That There was Competent Evidence** to prove a contract of marriage in an action for breach of promise did not render the admission of declarations of plaintiff to third parties that plaintiff and defendant intended to marry harmless, where the court stated in the presence of the jury that such evidence was competent.

**Breach of Marriage Promise—Damages.—Where, in an Action for Breach** of promise, the court charged that, if plaintiff and defendant entered into an agreement to marry, plaintiff was entitled to damages if defendant wrongfully violated the agreement, a further charge that the shock and injury to plaintiff's affections occasioned by defendant "having violated his promise" was a proper element of damages was not misleading.

APPEAL from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by Bertha Leibbrandt against Jean Sorg. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Jackson Hatch and E. M. Rosenthal for appellant; Sargent & Wyatt for respondent.

COOPER, C.—Plaintiff recovered judgment for $4,500 damages for breach of promise of marriage. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order.

Plaintiff testified fully as to all the facts and circumstances connected with the alleged contract of marriage. Her counsel then asked her this question: "Did you ever tell anybody about your contemplated marriage with Sorg?" Defendant objected to the question as immaterial, incompetent and ir-

relevant, and the objection was overruled. The judge at the time of the ruling remarked that the question would be allowed, not for the purpose of proving a promise of marriage, but to show humiliation on the part of plaintiff. The witness then answered that she said to Mrs. Barkley: "Mrs. Barkley, I am going to tell you the truth. I am going to get married, and I am going to marry a rich man, and will not have to work so hard any more." The witness further said that she thought she told Mrs. Barkley that the man's name was Sorg. The plaintiff's attorney afterward called Mrs. Barkley, who testified that she had a conversation with plaintiff in Santa Cruz about the last of August, 1898, in which plaintiff spoke about getting married. Then this question was asked: "Just relate what was said at that time." To this question the defendant objected upon the ground that it was incompetent, and that declarations made by plaintiff are inadmissible to show a contract of marriage on the part of defendant. The court overruled the objection, to which ruling defendant excepted, and the witness said: "No, I cannot tell." The plaintiff's counsel then asked the following question: "Did Mrs. Liebbrandt at that time say to you that she was to marry Mr. Sorg?" This question was again objected to, the objection overruled, and the witness answered: "Yes, sir." The court did not limit the evidence of Mrs. Barkley in any manner. On the contrary, the objection went directly to the point that the declarations of plaintiff are incompetent to show a contract of marriage on the part of the defendant. The testimony was hearsay and incompetent, and the ruling of the court clearly erroneous. It is provided in the Code of Civil Procedure (section 1845): "A witness can testify of those facts only which he knows of his own knowledge; that is which are derived from his own perceptions, except in those few cases in which his opinions or inferences or the declarations of others are admissible." This is not one of those few cases. We might search the text-books and decisions in vain for the purpose of finding any authority for the admission of the declarations of a party to a contract made to third parties in his own favor and in his own interest for the purpose of proving such contract. It is said in 2 Rice on Evidence, page 863, in speaking of evidence as to breach of promise: "The conduct of the defendant may be evidence of a promise by him in favor of a plaintiff, because

the conduct or declarations of a party are, upon general principles, competent evidence against him; but the conduct or declarations of a party are not generally evidence in his favor. And there seems to be nothing in the nature of a contract of marriage which should distinguish it from other contracts in this respect. . . . . The acts of the plaintiff, until they are communicated to the defendant, are not binding upon the plaintiff as constituting a contract. Why should they be evidence for the plaintiff of any part of a contract to bind the defendant?" It was said by the supreme court of Michigan in discussing this kind of evidence in McPherson v. Ryan, 59 Mich. 39, 26 N. W. 321: "And every reason that applies to the exclusion of this kind of testimony in other cases forbids its further use in actions of this nature. The plaintiff, as court and juries must ever be constituted, has certainly advantage enough of the defendant, without giving her the opportunity of fabricating by her acts and declarations, without his consent or knowledge, evidence to make a case against him. It would place almost any man at the mercy of an evil-disposed and designing woman. An adventuress could come into court, and swear to a promise of marriage, and then bring others of like ilk, her friends and intimates, to sustain her with testimony of the stories she had told them in furtherance of her plan to secure damages. Where the plaintiff has the equal right with the defendant to place fully before the jury the story of her wrongs, aided, as she will ever be, by the sympathy always accorded to both the weakness and the beauty of her sex—a sympathy which the most rigid administration of justice cannot entirely prevent—right and equity demand that she shall no longer have the aid which the law refuses in all other cases." The question of the admissibility of such evidence has been very fully discussed by the supreme court of Oregon in Osmun v. Winters, 25 Or. 260, 35 Pac. 250, and in the opinion it is said: "And there was no reason for allowing her to use her bare declarations, made without the knowledge or consent of the defendant, to support her case. Every reason which exists for the exclusion of such evidence in other cases forbids with equal force its use in a case of this nature." In Russell v. Cowles, 81 Mass. 582, it was held that such evidence was not admissible, and in the opinion this language is used: "And there seems to be nothing in the nature of the contract of

marriage which should distinguish it from other contracts in this respect." To the same effect are Cates v. McKinney, 48 Ind. 563, 17 Am. Rep. 768; Graham v. Martin, 64 Ind. 567; Walmsley v. Robinson, 63 Ill. 41; Dunlap v. Clark, 25 Ill. App. 575; 2 Pars. Cont., 8th ed., 62.

Our attention is called to the case of Reed v. Clark, 47 Cal. 199, in which it was held that, for the purpose of enhancing damages, the plaintiff was properly allowed to prove that within a few days after the proposal and acceptance the plaintiff announced her engagement to a few ladies with whom she was intimate, and whom she invited to attend the wedding. No authority is cited in the opinion, and the evidence was evidently held admissible upon the theory, as announced in some cases, that plaintiff, by way of damages, may prove that she made "preparations for the wedding." We are not inclined to extend the authority of that case beyond the facts therein appearing. The trend of modern decisions is that evidence of preparations for the wedding by plaintiff without the knowledge of defendant is not admissible: Osmun v. Winters, supra, and cases cited. The facts of this case do not come within the rule in Reed v. Clark. The witness Mrs. Barkley was not invited to the wedding. No wedding day was set or even talked of. She was permitted to testify to the bald declaration, in answer to a leading question, that the plaintiff told her she was to marry the defendant. The plaintiff was permitted to testify that she told Mrs. Barkley that she was going to marry defendant. Mrs. Barkley had not been invited to any wedding, and the conversation was not in the course of preparations for the wedding. We cannot say how much effect this improper testimony had upon the minds of the jurors. It will not be presumed that the jury disregarded it. In fact, the presumption is that the jurors relied upon it, in view of the fact that the judge, in their presence and hearing, held it to be competent. The fact that there was other competent evidence tending to prove the contract of marriage does not show that error was not prejudicial: Silveira v. Iversen, 128 Cal. 188, 60 Pac. 687. As the record contains the improper testimony, as herein stated, it becomes unnecessary to discuss the question as to the sufficiency of the evidence to justify the verdict.

The court did not err in giving the instruction numbered 12 to the jury. The shock and injury to plaintiff's affections

therein spoken of as an element of damages by "defendant having violated his promise to marry" could not have misled the jury. The sentence had reference to the preceding part of the instruction, to the effect that if the jury should find from the evidence "that plaintiff and defendant entered into an agreement to marry, one or the other, and that said defendant wrongfully broke and violated said agreement, and the plaintiff is entitled to damages therefor," then in assessing such damages the rule is given. The judgment and order should be reversed.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

HENSHAW, J.—I concur in the foregoing opinion and judgment. Such evidence is never admissible to prove the contract to marry. But, after competent proof of the contract, I think the evidence clearly admissible for the limited purpose of showing damage by reason of the humiliation following the breach of contract. A woman whose engagement is known only to herself and recreant lover will not, it may be assumed, suffer for his faithlessness quite so many and so keen pangs as the woman who has made announcement of her engagement to her circle of friends. Therefore, I think the ruling in Reed v. Clark is correct on principle, without supporting authority.

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## FRESNO CANAL AND IRRIGATION COMPANY v. McKENZIE et al.*

S. F. No. 1773; June 15, 1901.

65 Pac. 473.

**City Treasurer—Payment of Claim—Misconduct.**—Where a decree of a court having jurisdiction directed a city treasurer to pay a certain claim against the city, such decree was a complete defense to an action to charge him with official misconduct in having paid the claim.

*For subsequent opinion in bank, see 135 Cal. 497, 67 Pac. 900.

**City Treasurer—Payment of Claim.—Where Judgment had Been Rendered** for plaintiff in an action against a city treasurer and board of trustees to compel payment of a claim against the city, such judgment was sufficient to justify the treasurer in paying the claim, though the trustees refused to approve it, or issue a warrant thereon.

**City Treasurer—Payment of Claim.—Where a City Treasurer,** acting under a judgment, paid a claim against the city, such judgment was admissible in evidence as justification in an action charging him with official misconduct in having paid the claim.

APPEAL from Superior Court, Fresno County; J. R. Webb, Judge.

Action by the Fresno Canal and Irrigation Company against W. H. McKenzie and another. From a judgment in favor of defendants and from an order denying a motion for a new trial plaintiff appeals. Affirmed.

Frank H. Short for appellant; E. D. Edwards and W. C. Graves for respondents.

McFARLAND, J.—This is an action to recover $1,200 damages for alleged official misconduct by defendant McKenzie, as treasurer of the city of Fresno. The defendant James is sued as a surety on McKenzie's official bond. Judgment went for defendants in the court below, and plaintiff appeals from the judgment and from an order denying a new trial.

The alleged misconduct consists in the refusal by McKenzie to pay a certain warrant for $1,200 drawn on him by the city clerk, and payable out of the sewer fund of said city, and in paying to another person money of said fund, which, as plaintiff claims, should have been paid to plaintiff on said warrant. There is not much difference between the parties as to the facts. Plaintiff's grantor, McMurtry, during the years 1893 and 1894, had a contract with the city of Fresno for furnishing water for flushing the sewers of the city, for which he was to be paid $400 per month out of the sewer fund. He filed with the clerk of the city his demand under this contract for $1,200, alleged to have been due and unpaid for the months of October, November and December, 1893; and afterward, and prior to January 22, 1897, he assigned the contract and the said demand to plaintiff. On said January 22, 1897, the board of trustees of the city allowed and

approved said demand, and directed the clerk to draw a warrant on McKenzie against the sewer fund in plaintiff's favor for the amount of said demand. Such warrant was drawn on said twenty-second day of January, and on the same day was presented to the defendant McKenzie, who refused to pay it. However, one McBean had a contract with the city for taking care of its sewage for $4,900 per annum, payable quarterly, which contract also covered the years 1893 and 1894. The city had refused to pay him for the fiscal year 1893–94, upon the ground that the contract was illegal; and on the twenty-fifth day of June, 1894, he had commenced an action in the superior court against the city and the present defendant McKenzie to enforce payment of the amount due on the contract. At the commencement of his action he obtained an injunction restraining McKenzie from paying out the money in the sewer fund. McBean was defeated in the lower court, but on appeal to this court the judgment was reversed, and it was declared here that his contract was not illegal, and that he was entitled to recover the amount due thereon: McBean v. City of Fresno, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358. After the remittitur went down, and on August 13, 1896, the superior court rendered and entered judgment in favor of McBean against the city for $4,900, and decreed that it should be paid "out of any moneys now in the sewer fund of the city of Fresno for the year ending June 30, 1894"; and that "the treasurer of said defendant city of Fresno pay over to the said plaintiff any money now in his hands or subject to his control as such treasurer, or that may hereafter come into his hands or under his control as such treasurer, belonging to the sewer fund, for the fiscal year ending June 30, 1894, or out of any other money that may come into his hands or under his control of the sewer fund of said year as such treasurer, available therefor, and not otherwise appropriated." McBean, prior to the allowance of plaintiff's demand as hereinbefore stated, presented a certified copy of his judgment to the board of trustees, and demanded that it should be audited and allowed; but the board denied the demand, and afterward, notwithstanding said judgment, and disregarding the same, allowed plaintiff's demand as aforesaid. At the time of the entry of the judgment there was in the sewer fund for the fiscal year 1893–94 $2,603.75, and no more, and, upon the presentation

of the said judgment in favor of McBean, McKenzie paid to him the said sum of money. The judgment was presented to McKenzie prior to the presentation to him of the said warrant in favor of plaintiff.

The judgment appealed from is right. Where there are several holders of claims against a municipal corporation, each claim being payable only out of the municipal revenues of a certain year, and those revenues being insufficient to satisfy all the claims, no doubt, under our law on the subject as it now stands, creditors may be somewhat embarrassed, as was noted in Weaver v. San Francisco, 111 Cal. 319, 43 Pac. 972; but in the case at bar the question is whether or not McKenzie, as treasurer, was guilty of such official misconduct or malfeasance as made him liable to plaintiff in damages. The general rule undoubtedly is that the mandate of a court having jurisdiction in the premises protects the officer who obeys it, and we see nothing in the case at bar which takes it out of that rule. The force of the judgment is sought to be lessened by the suggestion that it refers only to moneys in the sewer fund "not otherwise appropriated"; but, even if that expression can be construed as qualifying all preceding clauses, and as embracing "any money now in his hands," still there is no ground for contending that the money decreed in the judgment to be paid by the treasurer to McBean had been theretofore "otherwise appropriated." There is nothing in the proposition that, although the trustees and the treasurer had defended the action brought by McBean, and judgment had been rendered in his favor, still such judgment was worthless unless the trustees should afterward "approve" it, and order a warrant to issue for its payment. All the opposition which the defendants in that action could make to McBean's demand was ended by the judgment, which was a judicial adjudication that the treasurer should pay that demand. The final arbiter was the court, not the trustees. Indeed, the ordinance itself, which provides for the auditing of demands and their payment on warrants, contains the clause, "except as otherwise by law provided." The contention of appellant that the court erred in allowing the introduction in evidence of the judgment-roll in the McBean case is, of course, under the above views, not maintainable. It could not have been rightfully excluded on the ground that appellant was not a party to that action. The respondent

had the right to introduce the judgment under which he justified his action, and the question is whether he was guilty of official misconduct in obeying it. The judgment and order appealed from are affirmed.

We concur: Henshaw, J.; Temple, J.

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## In re LAKEMEYER'S ESTATE.*

## BLIZARD v. DRINKHOUSE.

S. F. No. 2655; June 18, 1901.

65 Pac. 475.

**Appeal.—Where Appellant Did not File His Points and authorities in time, but they were on file at the time of hearing, a motion to dismiss the appeal will not be granted, no delay being caused.**

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial statement of the estate of Eugene Edwin Lakemeyer, deceased. Motion by Lillie R. Blizard, as contestant, to dismiss the appeal of John A. Drinkhouse, proponent of the last will of deceased. Motion denied.

A. Ruef and Geo. B. Keane for appellant; Carl Westerfeld for respondent.

PER CURIAM.—A motion by respondent to dismiss the appeal has been submitted. The ground of the motion is that appellant did not file his points and authorities in time. While the excuse given by one of appellant's attorneys under oath is not entirely satisfactory, still we think it sufficient to save his client from the penalty of a refusal to hear his appeal on its merits, particularly as the points were on file at the time of the hearing, and no delay was caused by the delinquency, which was only for a very short period. The motion is denied.

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*For subsequent opinion, see 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961.

# TRABING v. CALIFORNIA NAVIGATION AND IMPROVEMENT COMPANY.*

Sac. No. 752; June 25, 1901.

65 Pac. 478.

**Carriers—Injury to Passenger by Captain of Boat.—Plaintiff was Arrested** by the captain of defendant's steamboat, and chained to a post on the lower deck, and ejected before he reached his destination. The court charged that plaintiff could recover only the actual damages suffered by him, unless defendant authorized the acts complained of, or participated therein or ratified them; and that the jury should not allow anything by way of punishing the defendant, unless it authorized the captain's acts or ratified them; and that, unless defendant participated in or authorized the captain's acts or ratified them, the measure of damages would be the amount which would compensate the plaintiff for all detriment proximately caused by the wrongful acts. Held, that the instructions were not erroneous as contradictory and too general.

**Instructions.—Where the Matter Included in Requested** instructions was covered by the charge of the court, it was not error to refuse them.

**Carrier—Injury to Passenger.—An Instruction** that plaintiff was entitled to recover only the actual damages proven, as distinguished from mere imaginary or exemplary damages, was properly refused, as tending to mislead the jury as to the character of proof necessary.

**Carrier—Injury to Passenger's Feelings.—A Charge That Plaintiff** could not recover for his injured feelings and mental anguish was properly refused.

**Carrier—Damages for Ejecting Passenger.—Where Plaintiff,** a boy of fourteen, was arrested by the captain of defendant's vessel, and chained to a post, and was ejected at midnight, before reaching his destination, and was obliged to walk thirty miles to reach home, a verdict of $1,500 was not excessive.

APPEAL from Superior Court, San Joaquin County; Edward I. Jones, Judge.

Action by Charles Trabing against the California Navigation and Improvement Company. From a judgment in favor of plaintiff and from an order denying a new trial defendant appeals. Affirmed.

*Rehearing denied July 26, 1901.

Plaintiff, a boy of fourteen years, was arrested by the captain of defendant's vessel, and chained to a post on the lower deck, and was ejected from the boat at midnight, before arriving at plaintiff's destination, and thirty miles from his home.

Woods & Levinsky for appellant; Nicol, Orr & Nutter for respondent.

SMITH, C.—This is an action for damages for maltreatment of the plaintiff on one of the defendant's steamers. The jury returned a verdict for $1,500, and judgment was entered accordingly. The defendant appeals from the judgment, and from an order denying a new trial. The case was before this court on a former appeal, and is reported 121 Cal. 137, 53 Pac. 644, where the facts are more fully stated. The grounds urged for reversal are error of the court in giving or refusing instructions, and excessive damages.

1. On the former trial the court, at the instance of the plaintiff, instructed the jury, if they found certain facts therein enumerated, as follows: "I charge you your verdict will be in favor of plaintiff for such damages as, under all the circumstances of the case disclosed by the evidence, appear to be just, not exceeding the sum of $5,000," the sum demanded in the complaint. Also it refused the following instruction asked by the defendant: "I charge you that in cases of this kind the plaintiff can recover only the actual damages suffered by him, unless the master authorized the commission of the act complained of, or participated therein, or ratified it after its commission." And with reference to these instructions this court on appeal said: "As an abstract proposition of law, the instruction given is correct, but it is too general to properly guide a jury to a correct conclusion under the facts of this case. The instruction would apply to almost any conceivable case, whether the action were against the principal, or against the agent who actually committed the tort, and whether the facts did or did not justify exemplary damages. It left the question of exemplary damages entirely to the jury. The instruction refused should have been given. It would have informed the jury that they could not give exemplary damages. The jury were not re-

stricted to compensatory damages, either by the instruction asked, or any other instruction of similar import."

On the new trial the former of the two instructions commented on was again given, but with the following addition: "But in estimating such damages you must not allow or award anything for the sake of example, or by way of punishing defendant, unless it shall further appear to you from the evidence that the defendant authorized the commission of said acts of the captain, or ratified them after the commission." The court then, of its own motion, gave to the jury the following instruction: "(a) Unless you find from the evidence that the defendant corporation authorized, participated in, or ratified the act or acts of its servant or servants of which complaint is made, the measure of damages, if any you find, is that amount of money which will compensate the plaintiff for all detriment to him proximately caused by such act or acts of the defendant's servant or servants—his actual damage as distinguished from exemplary or punitive damages—which amount, under the rule just stated, must be determined, in view of all the evidence, by the sound judgment of the jury." The court refused to give the instruction refused on the first trial, and referred to in the former decision. It also refused to give various instructions that plaintiff could recover "actual damages proven," or "such damages as the plaintiff can actually prove, and has in fact sustained, as contradistinguished from mere imaginary, exemplary, or what is known as 'punitive damages' "; and also the instruction that the jury could not allow the plaintiff "any damages for injured feelings or mental anguish." It is claimed by the appellant that the court erred in the instructions given and in the refusal of those denied.

First. Specifically, the objection to the instructions given is to the part of the instructions given on the former appeal, and referred to in the decision, which it is claimed is erroneous and contradictory to the other instructions. But, as said in the former decision, "as an abstract proposition of law the instruction given is correct," and, though too general of itself to guide the jury, it was fully and satisfactorily explained and qualified in the other instructions.

Second. All of the instructions, in so far as they are correct, were in effect given in other parts of the opinion. The instructions asked as to "actual damages proven" were, in

their literal expression, correct, but as used they were calculated to mislead the jury as to the character of the proof necessary. Proof of the damages claimed was necessary, but proof of the amount of detriment, expressed in dollars and cents, was unnecessary. Such proof, in cases of this kind, is in its nature generally impracticable, and hence the amount of damages must be left, in large degree, to the jury: Sedg. Meas. Dam., sec. 356. The law on the subject was fully explained, and the term "actual damages" correctly defined in other parts of the instructions. The instructions that "damages for injured feelings or mental anguish" could not be allowed was rightly refused: Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320; 3 Suth. Dam., sec. 1245.

2. We cannot say that the damages allowed by the jury ($1,500) were excessive. In the former decision, referring to the verdict, which was for $2,500, the court said: "We cannot determine from the amount awarded whether it includes exemplary damages or not. If the jury were properly instructed on that subject, an excess in the amount given should be very clear to justify this court in disturbing their conclusion. The question, therefore, turns on the instructions given and refused." On the whole, I think the case was fairly tried on the principles established by the former decision. The judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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## DURKEE v. MOULTON.

L. A. No. 890; June 25, 1901.

65 Pac. 469.

**Trespass—Damages—Sufficiency of Evidence.**—The evidence of plaintiff in trespass as to the extent of damages resulting therefrom is sufficient to support a finding of a less sum as the damages sustained.

APPEAL from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Daniel Durkee against Lewis F. Moulton. From a judgment in favor of plaintiff and from an order denying a new trial defendant appeals. Affirmed.

E. W. Freeman for appellant; S. O. Houghton for respondent.

SMITH, C.—Action for trespass on plaintiff's lands by defendant's sheep. The plaintiff recovered $350 damages, with costs. It is claimed there was no evidence of trespass by any sheep of defendant, or that plaintiff was damaged in the sum of $350, or in any sum. The evidence seems to establish the trespasses complained of, beyond doubt, and plaintiff testified as to the nature and amount of the damage thereby caused. His estimate may have been excessive, and it was in fact cut down by the court, but it cannot be said there was no evidence to support the finding. I advise that the judgment and order denying a new trial be affirmed.

We concur: Haynes, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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## BASSETT v. LOS ANGELES TRACTION COMPANY.

L. A. No. 875; June 26, 1901.

65 Pac. 470.

**Carriers—Injury to Passenger—Presumption of Negligence.**—Where it is shown that an injury to a passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence, which throws on the carrier the burden of showing that the injury was sustained without any negligence on his part; and hence a verdict for plaintiff for injuries against a street railroad will not be reversed because the evidence fails to show that the rate of speed of the car at the time of the accident was excessive, or that the excessive rate of speed or other negligence of defendant was the proximate cause of

the injury, since it is sufficient that it fails to show that it was not so.

**Carriers—Injury to Passenger.—The Admission of Evidence** that defendant's cars had been running slower at the place where the accident occurred since it happened was harmless, if erroneous.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by Kate Bassett against the Los Angeles Traction Company. From a judgment in favor of plaintiff and an order denying a motion for a new trial defendant appeals. Affirmed.

E. H. Lamme and E. E. Millikin for appellant; Byron L. Oliver and John W. Kemp for respondent.

SMITH, C.—The plaintiff recovered damages against the defendant in the sum of $750 for personal injuries suffered by her while a passenger on one of the defendant's street railway cars. The car in which she was riding ran off the track at a point on Eighth street in the city of Los Angeles, and she was thereby thrown to the floor of the car and suffered the injuries complained of. The derailment, which took place in the daytime, was caused by a small stone or pebble on the outer rail of the track, which at this point was slightly curved. The principal question considered by the court, as appears from the opinion appended to the appellant's brief, was as to the rate of speed at which the car was running at the time of the accident. It appeared from the evidence that the general rate of speed used by the defendant was in excess of the statutory limit (Civ. Code, sec. 501), being over the whole route, including stoppages, in excess of ten miles, and over the section (of nine thousand two hundred and sixteen feet) where the accident occurred in excess of thirteen miles, per hour; and, on the particular day in question, from the terminus to the place of the accident, it was about or in excess of twelve miles an hour. From these facts, taking in consideration stoppages, and reduction of speed in passing curves, the court arrived at the conclusion that the rate of speed at the time of the accident was largely in excess of the statutory limit, and that this constituted negligence in law, and, irrespective of other evidence on the point,

rendered the defendant responsible. There was also evidence of opinion pro and con by witnesses as to the actual speed of the car at the time of the accident. But this evidence, being conflicting, and being in fact of little intrinsic value, may, in view of the finding of the court, be disregarded. The conclusion of the court is contested by the appellant's counsel; and it is argued, in effect, that the evidence was insufficient to show that the rate of speed at the time of the accident was excessive. But whether they are right in this need not be considered. It is sufficient that the evidence fails to show the contrary. The rule as established in this state is that, "when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence, which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part": McCurrie v. Southern Pac. Co., 122 Cal. 561, 55 Pac. 324, and authorities there cited. These authorities also dispose of the contention of the appellant that the evidence was insufficient to show that the excessive rate of speed or other negligence of defendant was the proximate cause of the plaintiff's injury. It is sufficient that it did not show the contrary.

Another point made by the appellant is that the court erred in admitting the testimony of a witness "to the effect that the defendant's cars had been running slower at the point where the derailment occurred since the accident." This evidence was perhaps inadmissible for the purpose of showing an excessive rate of speed at the time of the accident; but it does not seem to have been introduced for that purpose, but, rather, as a standard of comparison to enable the witness to render more definite her testimony as to the speed of the car at the time of the accident. It failed in its purpose, and probably, on motion, would have been stricken out; but in view of the more definite evidence in the case, and the view of it taken by the court, it could not in any way have injured the defendant, and, if erroneous, must be regarded as immaterial. I advise that the judgment and order appealed from be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

## READ v. SAN DIEGO UNION COMPANY et al.*

L. A. No. 884; June 26, 1901.

65 Pac. 567.

**Venue—Change—Residence of Defendants.**—Where, in an action against three defendants, two of whom are residents of the county and the third a resident of another county, it appears the residents, if interested, are proper parties plaintiff, and there is no allegation that they refused to join, the nonresident defendant is entitled to a change of venue to the county of its residence.[1]

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by T. J. Read against the San Diego Union Company and others. From an order denying a motion for a change of venue from Los Angeles to San Diego county, defendant San Diego Union Company appeals. Reversed.

Titus & Shaw for appellant; W. H. Shinn and Byron L. Oliver for respondents.

HAYNES, C.—This action was brought in the county of Los Angeles, in which defendants Bowker and Chandler reside. The defendant the San Diego Union Company, a corporation, has its legal residence and place of business in the county of San Diego, and in due time moved the court for an order changing the place of trial to that county. Said motion

*For subsequent opinion, see post, p. 845, 67 Pac. 1.

1 Cited and followed in Anaheim Odd Fellows' Hall Assn. v. Mitchell, 6 Cal. App. 433, 92 Pac. 332, in respect of the words of the court: "The joinder of resident parties as defendants, against whom no cause of action is stated, does not deprive the real defendant of his right to have the cause transferred," such "real defendant" in the Odd Fellows' Hall Association case being a married woman and the plaintiff protesting that her husband, codefendant, who had no interest in the property save as her husband, had not joined in demanding a change of venue.

Cited and followed in Hannon v. Nuevo Land Co., 14 Cal. App. 704, 112 Pac. 1105, the court saying that the question of who are necessary parties is to be determined by the complaint, and that the necessary party is entitled to a change of venue regardless of his coparties.

was denied, and said corporation appeals from the order denying said motion.

Said corporation, in 1891, and ever since, has been the publisher of a daily newspaper, and in said year entered into a contract with one Whitehouse, whereby it sold the entire city circulation of said newspaper to him upon terms therein specified. In 1892, Whitehouse sold and assigned said contract to defendants Bowker and Chandler, and they afterward sold and assigned to the plaintiff, T. J. Read, an undivided one-half interest therein. Each of these transfers was formally approved and accepted by the corporation. On July 29, 1899, said corporation served notice upon said Read, Bowker and Chandler that it rescinded said contract, and would not, after July 31, 1899, furnish them any newspapers for distribution, claiming the right to do so under the terms of said contract, the particulars of which need not be stated, and Read thereupon brought suit against said corporation to recover damages for breach of said contract, and made his co-contractors, Bowker and Chandler, parties defendant with said corporation. Said contract is set out in the complaint, and the various transfers thereof are alleged, clearly showing that Bowker and Chandler are co-contractors with the plaintiff in the contract alleged to have been wrongfully canceled or rescinded by the plaintiff, and, for aught that appears, equally interested with him in the recovery of damages from the corporation for the alleged breach thereof. It is not alleged that they refused to be joined as coplaintiffs with Read, or that their interests were adverse, nor were any facts alleged showing a right of recovery against them, unless it can be inferred from the general allegation that he, the plaintiff, has been prevented from carrying out his contract by the "defendants herein," in that defendants have "declined and refused to furnish and supply the plaintiff or his agents any newspapers for distribution." There is no allegation that Bowker and Chandler, his co-contractors, were in any manner interested with said corporation, or were under any obligation to furnish newspapers to the plaintiff for distribution; and the contract set out in the complaint shows conclusively that they were not. The defendants Bowker and Chandler answered, denying that they, or either of them, had at any time refused to permit plaintiff to carry out or perform said contract. The motion of the corporation

to change the place of trial was based upon the pleadings and the affidavit of its president, to which were attached certain exhibits, and made part thereof, one of which was a communication signed by Read, Bowker and Chandler, uniting, as parties to said contract, in a demand upon said corporation to continue to furnish to them and their authorized agents a sufficient number of copies of its paper to supply their subscribers, and notifying it that upon its refusal to do so they would hold the corporation and its stockholders liable for all loss. Affidavits were filed in opposition to the motion, but these were confined to the question of residence, and contained no statement tending to show any reason why Bowker and Chandler were not joined as plaintiffs. We think it clear that Bowker and Chandler were made defendants for the sole purpose of preventing a change of the place of trial to the county of San Diego, in which the corporation had its legal residence. The joinder of resident parties as defendants against whom no cause of action is stated does not deprive the real defendant of his right to have the cause transferred to the county of his residence for trial: Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120; Machine Co. v. Cole, 62 Cal. 318. The order appealed from should be reversed, with directions to the court below to grant appellant's said motion.

We concur: Chipman, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed, with directions to the court below to grant appellant's said motion.

## NORRIS et al. v. CRANDALL et al.

L. A. No. 895; June 26, 1901.

65 Pac. 568.

**Exchange of Property—Fraud.—Where, in an Action to Rescind** an exchange, the court found that defendant represented his property as worth $4,000, and believed it worth that, while it was worth only $2,000, the exchange should not be rescinded when the representation was made and relied on as an opinion, and not as a statement of fact.[1]

**Exchange of Property—Fraud.—Where Plaintiff Sought to Rescind** an exchange of property on the ground of fraud, and the court finds there was no fraud, a failure to find as to all the facts alleged in the complaint is not error.

**Exchange of Property.—Where, in an Action to Rescind an Exchange of Property,** the parties treated the value of the properties exchanged as material, and evidence thereof is admitted over plaintiff's objection, the judgment should not be reversed, since, if immaterial, it could not prejudice plaintiff.

**Witness.—Where, on Cross-examination, a Witness was Asked** numerous questions as to whether he had not made certain statements to another, but no time, place or circumstances were specified, it was not error to refuse to permit such others to testify as to such statements for the purpose of impeaching such witness.

**Evidence of Value.—Where a Lawyer Engaged for Twenty Years** as an examiner of titles and as attorney for leading loaning companies in a city testifies that he is acquainted with the value of certain lots therein, he should be permitted to testify as to such value.

APPEAL from Superior Court, San Diego County; J. W. Hughes, Judge.

Action by Adolphus G. Norris and another against Isadore A. Crandall and others. From a judgment for defendants and from an order denying a new trial plaintiffs appeal. Affirmed.

L. E. Dadmum and H. A. Jerauld for appellants; Parrish & Mossholder for respondents.

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1 Cited and approved in Crandall v. Parks, 152 Cal. 776, 93 Pac. 1019, and reconciled with the rule as stated in 2 Pomeroy's Equity Jurisprudence, section 878, to the effect that when a party affirms as to what he should speak merely by way of opinion, his affirmation may be regarded as a fraudulent misrepresentation.

CHIPMAN, C.—Plaintiffs were the owners of certain land situated in San Diego county, and defendants, or some of them, were owners of certain improved lots in the city of Lincoln, Nebraska. An exchange, after much negotiation, was finally agreed upon between the parties, and deeds made September 10, 1897. Defendants had formerly resided in Lincoln, but had removed to San Diego in 1895. Plaintiffs resided in San Diego county, and had, up to 1897, never been in Lincoln. Upon the exchange of deeds, plaintiffs and defendants went into the possession of their several lots and tracts of land, plaintiffs removing to Lincoln, where they arrived and went into possession October 5, 1897. The complaint alleged that the San Diego land and improvements were of the value of $3,600, and the personal property included in the trade (being farm implements and other ranch belongings) was of the value of $600, making in all $4,200; that defendants, through defendant G. H. Crandall, acting in their behalf, represented their Lincoln property to be worth $6,000, and that it was encumbered to the extent of $1,100, and no more; "that said property was worth and of the market value of four thousand dollars, at least, over and above said mortgages." Certain alleged false representations as to the improvements on the lots are set forth, and that the property was bringing nine dollars per month rent, and "that said real property was level, and in fine shape, and in a fine and first-class condition." It is alleged that plaintiffs had no personal knowledge of the property, and relied wholly on the representations of defendants, which, it is alleged, were entirely false, and fraudulently made to deceive and cheat plaintiffs, and on this ground the rescission is sought. Among other of the alleged false representations, it is alleged that, instead of a mortgage debt of $1,100 being on the property, it was encumbered in the further sum of $1,000.

The court made the following findings of fact: (1) That the San Diego property was of the same value, at the time of the exchange, as the Lincoln property, in excess of all mortgages thereon, to wit, of the value of $2,000. (2) That while the negotiations for the trade were progressing defendants gave to plaintiffs the name of a party then residing in San Diego, and pointed out his residence, to wit, J. F. Kinney, Esq., who, defendants informed plaintiffs, once owned a portion of the Lincoln property in question, and

could give plaintiffs any information they might desire regarding said Lincoln properties. (3) That defendant G. H. Crandall represented the Lincoln properties to be of the value of $4,000, and that he believed said properties to be worth that amount; that plaintiff A. G. Norris represented and that he believed his San Diego property to be worth $3,500, "but that neither plaintiffs' said property nor defendants' said property was worth but $2,000 over and above all mortgages and encumbrances, of which latter there were none on the Lincoln property except in the amount of $1,100." The finding 3 then states certain specific representations made by defendant G. H. Crandall, and that they were true, and that he did not represent the property "to be in fine shape, level, and in fine and first-class condition," and it is found that the representations made by said Crandall "were not made to deceive or to defraud plaintiffs, or either of them; that plaintiffs believed and relied upon the foregoing statements of said G. H. Crandall." (4) That plaintiffs went upon and took possession of the Lincoln property October 5, 1897, "and took no steps and made no offer to rescind their contract of exchange of said properties," and gave no notice of any dissatisfaction with the trade until July, 1898. (5) That plaintiffs knew, when the exchange was made, that defendants had not seen the Lincoln property since October, 1895. (6) That the allegations of fraud in plaintiffs' complaint alleged against defendant G. H. Crandall are not sustained by the evidence. (7) That plaintiffs were not induced to exchange their property "by the fraudulent representations or statements of said defendants, or any of them."

1. It is contended that findings 1, 3 and 4 are not supported by the evidence, and that on findings 1 and 3 the judgment should have been for plaintiffs, because the court found that defendants represented their Nebraska property to be worth $4,000, and that plaintiffs believed and relied upon these representations, whereas the court found the property to be worth only $2,000 over and above the mortgage of $1,100, thus making the value of $3,100 instead of $4,000. There would be force in the latter of the above contentions if the evidence compelled the conclusion that the exchange of properties was brought about by a false statement of value by defendants made as a substantive fact on which plaintiffs relied as a fact, and not as defendants' opinion as to the fact.

We do not, however, think that the evidence would justify any such conclusion. The evidence was that negotiations for the exchange were entered upon in the early part of August, 1897, and continued at intervals until in September, when the deeds passed. Defendant G. H. Crandall testified fully as to the representations made by him (and he is the only defendant charged with having made any). After stating what he told plaintiff Adolphus Norris as to the improvements, the situation of the lots, and also as to the condition of the improvements in 1895, when the defendants last saw the property, the amount of encumbrances on the property, and like matters, as to which the court found with defendants, the witness continued: "I told him in good times the whole property there—the three lots and four houses—ought to be worth $4,000; but I told him it was like property here,—it was at a standstill; property was not moving much; and that, if he had to sell, I did not think that he could get more than half that amount; I said: 'It is just like it is with your property here. You place your property at $3,000, and you know the way property is selling here that you could not get half that for it.' We had several conversations, and they were all materially just about the same. I told him, if he wished to know more about the place, he had better write; that he could find any quantity of real estate men there that could tell him all about the property. 'If you don't want to go to that trouble, there is a man in the city of the name of Judge Kinney, that platted that addition, who could tell you all about it.' I told him that the property when we left, in 1895, was in good condition, but how it was at the time we made the trade I did not know. . . . . I told him there was a draw running through the place, or dry creek, called 'Antelope Creek,' and that this two-story house was built into the bank of the creek or draw, and that the chicken-house was built into the same bank; and all those representations were true." It appeared that the property was situated in about the center of the city, taken as a whole; that there were fine residences erected near by; that the location was favorably located with reference to street-cars and to the business portion of the city, to schoolhouses, churches and like conveniences. Some of the conversations between plaintiff Adolphus Norris and defendant G. H. Crandall

were in the presence and hearing of the latter's father and sister in the store of G. H. Crandall. They were called as witnesses, and corroborated the statements made to Adolphus Norris by G. H. Crandall, as testified to by the latter. The evidence shows that what was stated as to the value of the Lincoln property was but the opinion of Crandall; and other testimony of other witnesses placed the value at quite as high a figure as Crandall thought the property worth. There was testimony introduced by plaintiffs to the effect that the Nebraska property was not worth the mortgage debt, and defendants' witnesses varied much in their estimate of its value. The same may be said of the value placed by witnesses on the San Diego property, some of whom testified to a value as low as $250. It is evident that the court concluded from the testimony that Crandall did not make his statements with any intention to mislead Norris, or to gain a fraudulent advantage in the transaction, and that Norris did not make the exchange in reliance on Crandall's statement of the value of the Lincoln property as a substantive fact, but merely as his opinion. In this conclusion of the court support is found in the evidence.

2. There were certain facts alleged in the complaint, paragraphs 6 to 13, inclusive, in failing to find on which it is claimed the court erred. The court did find upon such of these paragraphs as alleged the representations made by Crandall, as to their influence on plaintiffs, as to whether they were fraudulently made, and as to the mortgage indebtedness on the Lincoln property. It is true, the evidence shows that there were mortgages for $1,000 in excess of the $1,000 represented by Crandall to be the only liens on the property. But it also appeared that the $1,000 mortgages had in fact been paid, but were not satisfied on the record, although Crandall supposed they had been. They were, however, subsequently satisfied. The other allegations were found upon either specifically, or were covered fully by the finding against the alleged fraudulent intent, or they were allegations of merely probative facts, not necessary to be found upon. The findings support the judgment. The principal ultimate fact in the case on which plaintiffs relied was whether Crandall falsely and fraudulently, and with intent to deceive plaintiffs, made the representation alleged. The finding being against plaintiffs on this fact, no finding in

their favor on the omitted facts would justify a different judgment: Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557.

3. Certain witnesses were allowed, against plaintiffs' objection, to testify to the value of plaintiffs' property, and this is claimed as error, as it appeared that defendants saw the land before they purchased. Plaintiffs alleged that the value of their property at the time of the trade was $3,600 for the land. Defendants denied that the land was of greater value than $1,000. The court found that the value of the real property was $2,000. The parties seem to have treated this as an issue in the case, although, in view of the other issues, we cannot see that it was particularly material. However, the testimony, if immaterial, could have worked no prejudice to plaintiffs.

4. Error is claimed in refusing to allow the witness W. B. Norris to testify to certain conversations with the witness G. H. Crandall, who, when testifying, denied the conversations. The objection was that no sufficient foundation was laid for the impeachment of the witness Crandall; that the place where, the time when, and the persons present were not given in the questions asked on cross-examination. The record reads as follows: "Plaintiffs recalled W. B. Norris [not plaintiff] in rebuttal, and offered to show that G. H. Crandall, in the months of September and October, 1897, at his store in San Diego, California, stated to W. B. Norris during the conversations that there was a fine two-story house on lots 7 and 8, and that the draw in the lots did not amount to anything; that one could take a plow, and run a furrow alongside of the road in front of the lots, which would keep all the water from running through the lots, and would fill up the draw; that the property was worth $5,500; and that the lots were not cut up or washed out any, but were good lots, and laid well." When the witness Crandall, whom it was proposed to impeach, was testifying, he was asked a great many questions as to whether he had not made certain and different statements at different times to the witness Norris, some of which were sufficiently definite as to time and circumstances, while others were not thus definite. In none of them was the store of the witness Crandall named as the place, and in none of them was any person named as present, nor did it appear that the two persons

only were present. It will be observed that plaintiffs did not formulate any question for the impeaching witness to answer, but stated generally what they proposed to show; and the offer embraced several different statements of conversations claimed to have occurred in two different months, giving no time in the months, and naming no persons as present, but fixing the place as Crandall's store, a place at no time mentioned to Crandall when on the witness-stand. The proper method of impeachment is to formulate the question so as to embrace the very statement, at least in substance, which the witness whom it is desired to impeach has denied making, and to ask the impeaching witness for a categorical answer whether the statement was made, giving "the circumstances of times, places, and persons present": Code Civ. Proc., sec. 2052. Both parties cite Plass v. Plass, 122 Cal. 4, 54 Pac. 372. In that case it appeared that no persons were present at the time and place mentioned except the interlocutors. It was held that, where it appeared that no persons were present except the impeaching witness and the witness sought to be impeached, it was not necessary to state in the impeaching question, "No other persons being present." It was also held that, where it appears that only the two were present, it would be superfluous to require a statement that the person spoken to was present, as it must be presumed he was present, or he could not have been spoken to. The case here is not brought within the facts of the Plass case. We think the court made a correct ruling.

5. It is claimed that the court erred in permitting the witness Brown to testify in defendants' behalf as an expert on the value of real estate, and in refusing to strike out his testimony. It is claimed that mere opportunity offered for observation will not constitute one an expert, or render his opinion admissible; that he must have been educated in the business about which he testifies, or has acquired actual skill and scientific knowledge upon the subject; citing Code Civ. Proc., subd. 9, sec. 1870; Goldstein v. Black, 50 Cal. 463; Reed v. Drais, 67 Cal. 491, 8 Pac. 20, and other cases. In the present case Brown testified that he was a lawyer, and had been engaged for twenty years as examiner of titles of real estate in Lincoln; that he was acquainted with the value of real estate in that city in the years 1895 and 1897,

and was acquainted with the value of the lots in question, and of the real property in that vicinity; that he had acted for twenty years for some one or other of the leading loaning companies doing business in Lincoln, the managers of which kept themselves well informed as to not only the market value, but as to the income value, of improved properties. The witness possessed something more than mere opportunity for observation. His profession, and his particular specialty in that profession, and his employment by those who were loaning money based upon values of real property, gave him the required knowledge, and he testified that he had knowledge of the values of the property in controversy. The witness brought himself within the rule and the reason of the rule as laid down in Reed v. Drais, supra, and the authorities there cited, and the question there was as to the value of real property.

We discover no error in the record, and therefore advise that the judgment and order be affirmed.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## WILSON v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.*

S. F. No. 2618; June 28, 1901.

65 Pac. 575.

**Criminal Law.—Where on Appeal an Order of the Police Court** denying petitioner a new trial was reversed, and a new trial had in the superior court, resulting in a conviction, as to the appeal from the order denying the new trial there was a finality as to petitioner's rights.

**Criminal Law.—Defendant, Being Convicted in Police Court,** appealed to the superior court from an order denying a new trial, which order was reversed, and on new trial in the superior court

*For opinion on petition for rehearing, see post, p. 766, 65 Pac. 1027.

defendant was convicted. Thereafter the superior court, by mistake, owing to the papers on appeal bearing a different number, rendered a decision reversing the judgment of the police court. On the attention of the court being called thereto, it set aside the order wherein the judgment was reversed. Held, that the judgment rendered on appeal reversing the order denying a new trial, and the conviction of appellant on such new trial in the superior court, was final, and there was, therefore, in fact no appeal in the case pending, in which the second judgment was rendered reversing the judgment below.

Petition by Herbert E. Wilson for a writ of mandamus against the superior court of the city and county of San Francisco. Denied.

George D. Collins for petitioner; Lewis F. Byington for respondent.

GAROUTTE, J.—The petitioner prays for a writ of mandate against the superior court of the city and county of San Francisco, asking that an order be made directing that court to try him upon a certain criminal charge therein alleged to be pending against him. The petitioner further asks that, if such relief be not granted, then that the court be ordered to hear and determine an alleged pending appeal taken by him from a judgment rendered against him in the police court.

As to the first branch of relief prayed for, we see no merit in the claims of petitioner, for by the record the facts appear to be that he appealed to the superior court from an order made by the police court denying his motion for a new trial, and upon the hearing of that appeal he was granted a new trial in the superior court. That trial has been had, and his conviction resulted. As far as the appeal of petitioner from the order denying his motion for a new trial is concerned, this would seem to be a finality of his rights.

Laying aside any question as to the appeal above considered, and the substantial legal results following therefrom, if there be any, the court will proceed to consider the remaining branch of the case, involving the appeal from the judgment. An appeal was taken by the petitioner from the judgment of the police court. That appeal was heard and submitted, and thereafter decided by the superior court. By that decision the judgment of the police court was affirmed September 7, 1900. The appeal decided upon said

day was the only appeal ever taken from the judgment rendered by the police court against petitioner. Thereafter, upon December 21, 1900, the superior court, by mistake, owing to the papers upon appeal at this time bearing a different number from that entered upon them at the time the appeal was decided upon, September 7th, rendered a decision reversing the judgment given by the police court. Upon December 26th, the attention of the superior court being called to its mistake, it set aside the order of December 21st, wherein the judgment was reversed. As before suggested, there was but one appeal taken by petitioner from the judgment of the police court. That appeal was disposed of by the judgment of the superior court rendered September 7, 1900. At the time the judgment was rendered by the superior court, December 21, 1900, there was no appeal in the case pending before that court, and the whole proceeding relating to the reversal of the judgment at that time was null and void. The mere numbering of the papers with different numbers in no way affects the question before the court. These different numbers upon the papers, in conjunction with the fact that the court in bank at these various times was made up of different departments, undoubtedly led to the complications and mistakes here indicated. That is the only result following therefrom. The court took jurisdiction of the appeal from the judgment when it ordered it submitted upon briefs thereafter to be filed; and by deciding the appeal upon September 7, 1900, it exercised that jurisdiction over it which it had already assumed. We see no sound reason why the judgment rendered at that time may be declared void, even conceding that mandate would run to compel a trial or hearing, when there had already been a hearing which resulted in a void judgment. It follows, from what has been said, that there is no merit in this application. Petitioner is neither entitled to a trial, nor entitled to have the appeal which he took from the judgment of the police court now heard. That appeal has once been heard and determined against him, and his rights thereunder are foreclosed. For the foregoing reason the application for the writ is denied.

We concur: Van Dyke, J.; McFarland, J.; Temple, J.; Henshaw, J.

## DE CARRION v. DE AGUAYO et al.

L. A. No. 903; June 29, 1901.

65 Pac. 618.

**Mortgage—Deed Absolute.—Plaintiff's Grantor Borrowed Money** at a bank, stating that defendants had applied to him for a loan to pay off two mortgages and that they would deed him the property. The mortgages were taken up, and assignments of them made to plaintiff's grantor, defendants deeding him the premises. Subsequently plaintiff's grantor presented defendants with a paper which showed the amount of the interest due on the alleged loan, and defendants paid him a fee for the services of the person who computed the interest. After execution of the deed, defendants continued in possession of the premises, paying no rent or leasing the premises, and continuing to make improvements. **Held**, that the deed was a mortgage.[1]

APPEAL from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Dolorès N. De Carrion against Ygnacio De Aguayo and another. From a judgment in favor of defendants and from an order denying a motion for a new trial plaintiff appeals. Affirmed.

S. O. Houghton for appellant; John E. Daly for respondents.

COOPER, C.—Judgment was entered in the court below for defendants. Plaintiff made a motion for a new trial, which was denied. This appeal is from the judgment and order denying the motion.

The complaint is for the recovery of the possession of the lands described therein, and contains the usual allegations in ejectment. The answer, in addition to a denial of the allegations of the complaint, alleges affirmatively that defendants are, and were at all the times therein named, the

[1] **Cited** in Holmes v. Warren, 145 Cal. 462, 78 Pac. 956, where the court called attention to the defendants in the cited case having shown that they had not leased the premises or paid rent, although remaining on them as occupants; and the court said, in that connection, that in these cases the burden is on him who claims the deed to be in fact a mortgage to produce facts to support his claim.

owners and seised in fee of said lands; that on the fifteenth day of June, 1892, they executed and delivered to one Saturnino Carrion, since deceased, and who was the husband and grantor of plaintiff, what purported to be a grant, bargain and sale deed of the premises, which deed was recorded; that said deed, although absolute in form, was intended to be, and was in fact, a mortgage to secure the payment of $1,000 to plaintiff's grantor, with legal interest thereon. It was admitted that, unless the said deed was in fact made as a mortgage, the plaintiff would be entitled to judgment. This was the only issue in the case. The court found: "That the said instrument though in the form of a deed absolute, was executed and delivered to said Saturnino Carrion as, and was intended to be, a mortgage to secure the payment of one thousand dollars, with interest at the rate of seven per cent per annum from the seventeenth day of May, 1892." It is claimed that the evidence is insufficient to sustain the above finding, and this is the sole question to be here determined. We have carefully examined the evidence, and, in our opinion, it amply supports the finding. Without giving the evidence in detail, it is sufficient to state that there is evidence of the following facts and circumstances: On the 17th of May, 1892, there were two mortgages existing against the property of defendants described in the complaint; one in favor of one Hilsey for $700, and one in favor of one Frankel for about $180. That on said day the plaintiff's grantor applied to one Jess for a loan of $1,000, stating that defendants owned some property on which there were mortgages, and that, as the mortgagees desired their money, defendants wanted to pay off the two mortgages, and deed him the property. Jess accordingly loaned the plaintiff's grantor $1,000 upon his own promissory note. Defendants appeared at the bank of which Jess was cashier, and the two mortgages were taken up, and assignments of them made to plaintiff's grantor. The balance of the $1,000, after paying the two mortgages, was left in the bank, and afterward paid out either to Frankel or to plaintiff's grantor. Defendants did not receive any of it. The mortgages so assigned to plaintiff's grantor have never been satisfied of record, nor have the notes been delivered up or canceled. The money was borrowed from plaintiff's grantor. That the deed was in-

tended as a mortgage. That, after the deed was made, the grantor of plaintiff had one Seaver compute the interest on the $1,000 from the 17th of May, 1892, to the seventeenth day of November, 1896, showing the amount then due to be $1,551.13, which computation was made upon a piece of paper and handed to one of the defendants. Defendants paid to plaintiff's grantor one dollar, which he told them he had paid Seaver to figure up the interest for him. After the deed was made, defendants continued in possession of the premises as before. They never paid any rent nor leased the premises. They continued to make small improvements as before. Nothing appears as to any agreement of sale having been made or any price being named for the deed. Plaintiff's grantor died February 16, 1897. It does not appear that plaintiff took any greater title than that of her grantor at the time of the conveyance. It is not claimed that she is an innocent purchaser without notice. These facts and circumstances, if true, are sufficient to support the finding.

There was testimony on the part of the plaintiff tending to contradict some of the matters above set forth; but, in case of a substantial conflict in the evidence, the finding of the court below is conclusive here. Not only this, but we think the finding is supported by the great preponderance of the evidence. If Saturnino Carrion took the deed from defendants in June, 1892, as an absolute conveyance of the property, it is strange that nothing was said in the negotiations as to the price thereof. It is a circumstance of much significance that the defendants remained in possession of the property as their own continuously after the deed was made until the death of Carrion. If Carrion had in fact purchased the property, it would seem that in the ordinary course of business he would have entered into possession of it, or, if he allowed defendants to remain in possession, it would have been under a lease of some kind. If he purchased the property, why did he take an assignment of the two mortgages which he paid out of the $1,000? The fact —which is conceded—that in November, 1896, the grantor of plaintiff had the interest computed on the $1,000, and gave the computation to defendants, asking them for the dollar paid to Seaver for making the computation, is wholly inconsistent with the idea that the property was his. It is

entirely consistent with the claim of defendants that the deed was made as security only. The judgment and order should be affirmed.

We concur: Haynes, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

On Motion for Hearing in Bank.

July 29, 1901.

PER CURIAM.—Rehearing denied.

McFARLAND, J.—I concur in the denial of a hearing in bank, but I think that the expression in the opinion that "in case of a substantial conflict in the evidence the finding of the court below is conclusive here" should be stricken out. That rule does not apply to a case where an absolute deed is sought to be declared to be something else.

I concur: Beatty, C. J.

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## PEOPLE v. BRADY et al.*

Cr. No. 746; July 6, 1901.

65 Pac. 823.

**Burglary—Verdict.—Under Penal Code, Section 1151,** providing that a general verdict on a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment, the designation of the offense in a general verdict is mere surplusage, and a verdict finding defendant guilty of "burgulary" is valid.[1]

**Burglary.—Defendant Leased a House in Which There was** no furniture. A vacant house on another farm about nine miles distant contained household furniture, which was found in defendant's possession at the time of his arrest. One witness testified that the

*Rehearing denied August 6, 1901.

[1] Cited and followed in State v. Schweitzer, 18 Idaho, 613, 111 Pac. 131, where the jury had brought in a verdict of "guilty of selling by short weight as charged in the complaint."

defendant had borrowed a team about the time the furniture was supposed to have been taken, and another witness testified as to seeing such a team going in the direction of the vacant house, and later return toward the defendant's place. Defendant made many contradictory statements as to where he obtained the furniture. Held, sufficient to warrant a conviction for burglary.

**Burglary—Participant in Crime.**—The fact that a person was living with one guilty of burglary at the time the burglary was committed, and that he made untruthful statements as to where the guilty party obtained the property, is not sufficient evidence to warrant the conviction of such person as participating in the crime.

**Burglary—Cross-examination.**—Where, on a Prosecution for Burglary, the defendant's wife had testified as to the purchase by her husband of the alleged stolen articles, it was proper cross-examination to ask her as to statements, inconsistent with her testimony, at the time of her husband's arrest.

**Burglary—Possession of Stolen Property.**—On a prosecution for burglary, it was not error to instruct that the possession of stolen property soon after the commission of the alleged offense by the person charged was a circumstance tending to prove their guilt, and that the jury should consider the proximity of the place where the property was found to the place of the alleged burglary, the lapse of time since the property was taken, the character and nature of the property taken, and whether the parties denied or admitted the possession, in determining how far the possession of the property by the accused tended to show his guilt.

**Burglary—Verdict.**—On a Prosecution for Burglary it was not error to leave it to the jury to formulate their own verdict on blank forms furnished, stating the degree of guilt of the defendants, if either of them were guilty, and that, if the jury needed further instruction as to framing a verdict, it should return to the courtroom for such instruction.

APPEAL from Superior Court, San Joaquin County; Edward I. Jones, Judge.

Walter Brady and George Helms were convicted of burglary and they appeal. Affirmed as to Brady and reversed as to Helms.

A. V. Scanlan for appellants; T. L. Ford, attorney general, and C. N. Post, assistant attorney general, for the people.

CHIPMAN, C.—Defendants were jointly accused of the crime of burglary, were tried together and convicted, the

jury returning the following verdict: "We, the jury in the above-entitled cause, find Walter Brady and George Helms, defendants, guilty in the first degree for burgulary." Defendants moved for their discharge, and also for a new trial, and both motions were denied, and they appeal from the judgment and from the order denying their motion for a new trial.

1. The motion for discharge was on the ground that the verdict was no verdict, because there is no such offense known to the law as "burgulary"; citing People v. St. Clair, 56 Cal. 406, where the indictment charged an entry into a stable with intent to commit "larcey." It was held that there was no such felony as "larcey" known to the law, and that the maxim idem sonans did not apply. In that case the fatal defect was in the indictment itself, and not in the verdict of the jury. The error here was in the orthography of the word "burglary" as used in the verdict, and was merely a clerical error, which seems to have been overlooked by the court and counsel until the motion for a new trial was made. Where the intention of the jury is unmistakable, mere clerical errors should be disregarded: Jeansch v. Lewis, 1 S. D. 609, 48 N. W. 128. The verdict, being general, and fixing the degree of the crime, would have been complete had the word "burgulary" been omitted altogether. Penal Code, section 1151, which provides: "A general verdict upon a plea of not guilty is either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the indictment." The obnoxious word may be rejected as surplusage, if necessary to sustain the judgment. But, aside from the foregoing considerations, we think the word used by the jury cannot be read as any other word than "burglary."

2. It is urged that the evidence is not sufficient to sustain the verdict, for the reason that there was no evidence in any way tending to establish the charge except the possession of the property claimed to have been stolen. We have carefully examined the testimony, and are satisfied that there is sufficient evidence to support the verdict as to defendant Brady, but not as to defendant Helms. It appeared that on July 5, 1900, defendant Brady leased from one Keagle a place in the country, known as the "Pope

Place," situated between Stockton and Lodi, about three miles south of the latter town, and moved into the house on the place with his family, including defendant Helms, and they remained there until July 22, 1900, when defendants were arrested, and that there was no furniture in the house when Brady took possession. This place is about nine miles from the Cy Moreing place, owned by one Solari. On July 7th a vacant house on this place contained the various household articles afterward found in the house rented by Brady, and the property was fully identified by Solari. He went to his place July 21st, and discovered that the articles were gone, and he testified "that he saw them on the Pope place on July 23, 1900." One Spelti testified that defendants on July 11, 1900, borrowed from the Lewis ranch, where witness was working, a sorrel horse and bay mare with a sorrel colt; that they were returned to the Lewis ranch, July 23d, by Constable Coleman, of Lodi; that defendants came to witness' place in a wagon, and that Brady's wife and some children were in the wagon. Witness Mrs. America Gum testified that on the 8th of July defendant Brady, with his wife and grandson, came to her house in a light two-horse wagon, and borrowed and took away with him a heavy two-horse wagon. This wagon was afterward found near the Pope place. Witness Dolan testified that on July 13th, "a little after sundown," he saw two wagons passing in the direction of the Cy Moreing place, about two miles south of where the witness was; he was near the wagons, one of which was a large two-horse wagon, drawn by a bay and sorrel; the other was a "small, heavy-sized spring wagon, with a bed about twelve feet long, . . . . drawn by a bay and a brown"; the teams were traveling close together, and "a little sorrel colt traveling with one of the teams, and, going down, he was right near the sorrel horse"; that "the same night, about an hour and a half later, he saw the same teams, wagons, and persons pass him, at the same place, going north; that he was about twenty feet from them, and had a lantern with him; that after they passed he put away his lantern, got on a horse, and followed them about two miles, . . . . to what is called the 'Goodwin Place,' where he stayed about an hour, listening to the wagons, which continued north for about two miles, and then turned west in the direction of

the Pope place." He did not recognize the persons, and did not testify who they were. He testified that he afterward saw one of the same wagons "at the Tyndal place, two hundred yards south of the Pope place." This was the same wagon that was borrowed from Mrs. Gum. Another witness "saw defendant Brady and another man, whom he did not know, in Lodi on July 20th, with Mrs. Gum's wagon." Other witnesses testified to seeing on the Pope place the wagons and horses and colt similar in description to those testified to by the witness Dolan. There was much evidence tending to show that defendant Brady made contradictory statements as to where he got the property, claiming that he bought the stove in San Francisco, and that he bought some of the property at a second-hand store in Stockton. When asked to go with the arresting officer to the place referred to in Stockton, he went with him, but was unable to find it, and he made contradictory statements as to where the place was. He also claimed that he bought the articles from an expressman in Stockton named Frank A. Jones, but several witnesses who knew all the junk dealers and expressmen in Stockton, as well as the arresting officers, were unable to locate or find any such person in Stockton. Without further statement of the evidence, we think the jury had sufficient facts before them to warrant a verdict of guilty as to defendant Brady.

There is no evidence connecting Helms with the taking or with the possession of the goods, except that he was living in the house with Brady. There was evidence that Helms told a witness that Brady got the articles where Brady had told the witness he got them; that Helms was with Brady when the latter got a team from the Lewis ranch, but not when he got the wagon from Mrs. Gum, which was hired to Brady. So far as appears, defendant Brady had a team and wagon of his own, and it appears that on July 9, 1890, some articles of furniture were delivered to Brady at the Union Transportation Company's wharf at Stockton. Helms was seen with Brady about July 22d, and he testified that he was living with him on July 9th. But there is no evidence that he had possession of the stolen property or made any claim to it whatever or had anything to do with it. If he made statements contrary to the truth as to where Brady got it, that fact would

not tend to show that Helms aided in stealing it. He was not asked to explain his possession of the property, and made no explanation, for the obvious reason that he was not in possession of it.

3. Mrs. Brady was a witness for defendants, and on cross-examination the district attorney asked her the following question: "Q. Mrs. Brady, do you remember being in the sheriff's office on the 24th of July, 1900?" Defendants objected as not cross-examination. The question was completed by stating the persons present, after which the witness was interrogated at considerable length as to what was said by her at that time relative to certain of the stolen articles and where her husband got them. She had testified in chief that her husband purchased the property in question in Stockton on July 9th from one Jones, and paid $18 for it, taking Jones' receipt for the money. It was competent on cross-examination to impeach the witness by showing that she had made statements inconsistent with her testimony, relative to the matter about which she had testified in chief, and the cross-examination was to lay the proper foundation. We see no error in the ruling.

4. The following instructions are objected to: "The court instructs the jury that the possession of stolen property recently after the commission of the alleged offense by the persons charged, if you find any such property to have been in their possession, if unexplained, is a circumstance tending to prove their guilt; and if the jury believe from the evidence that the defendants were found with the stolen property in their possession, if you find any was feloniously taken, then, to determine the weight to be attached to that circumstance as tending to prove guilt, the jury should consider all the circumstances attending such possession, proximity of the place where found to the place of the alleged burglary, the lapse of time since the property was taken, the character and nature of the property taken, whether the property was concealed, whether the parties denied or admitted the possession, and the demeanor and character of the accused. All of these circumstances, so far as they have been proved, are proper to be taken into account by the jury in determining how far the possession of the property by the accused, if it has been proved, tends to show his or their guilt." The court also gave the follow-

ing: "Although you cannot, under the information, find the defendants, or either of them, guilty of any offense other than burglary, it would be somewhat difficult to furnish you with the complete form of every possible verdict at which, according to your view of the evidence, you may arrive. The court will therefore furnish you mere blank forms. Upon one of such forms you will formulate your verdict, and your foreman will sign it. You will be careful to dispose of the whole case, observing that there are two defendants, and if you find either or both of them guilty of burglary you will specify whether in the first or second degree. With proper care, you will probably be able to frame a verdict, but, should you need further instruction, you may request the officer in charge of you to return you to the courtroom for such instruction." We discover no error in either of these instructions. The judgment and order as to defendant Brady should be affirmed and as to defendant Helms they should be reversed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order as to defendant Brady are affirmed and as to defendant Helms they are reversed.

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## TAYLOR et al. v. ELLENBERGER et al.*

S. F. No. 2476; July 16, 1901.

65 Pac. 832.

**Mortgage Foreclosure—Modification on Appeal—Restitution.**—Code of Civil Procedure, section 957, provides that when a judgment is reversed or modified the appellate court may make restitution of all property lost by the erroneous judgment or order, so far as such restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment. The supreme court directed a superior court to modify a judgment of foreclosure for the sale of personalty and realty by ordering a separate sale of each, which modified decree was entered after the real estate had been sold. Held,

*For subsequent opinion in bank, see 134 Cal. 31, 66 Pac. 4.

that the direction for the restitution of the property being discretionary, such sale would not be set aside, in the absence of any showing that the mortgagors had been injured by the sale, and that the proceeds were insufficient to pay the real estate mortgage.

**Mortgage Foreclosure—Appeal.—A Contention That an Order of Sale** directed to be executed by the sheriff was void where performed by a commissioner will not be considered on appeal, the question not having been raised in the lower court.

**Mortgage Foreclosure—Irregularity in Order.—Under Code of Civil Procedure,** section 726, as amended in 1893, providing that a commissioner, when appointed to conduct a foreclosure sale, shall possess the powers and be subject to the duties of sheriffs in like cases, a sale conducted by a commissioner is not vitiated by the fact that the order of sale was directed to the sheriff, the direction to the sheriff being a harmless irregularity.

**Mortgage Foreclosure.—Where the Supreme Court Ordered a Judgment Modified,** a contention that the judgment, as modified, was erroneous, in that the trial court did not amend the findings, is without merit, since the supreme court cannot modify a judgment if it is necessary to amend the findings to support it, the findings not being in the control of such tribunal.

**Mortgage Foreclosure.—Where the Commissioner's Deed and Demand** for the premises had been presented to the general guardian of an incompetent, who was the owner of the premises, the demand was sufficient, without being made on the incompetent, and a writ of assistance will not be set aside for improper service.

APPEALS from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by George G. Taylor and others against Arnold Ellenberger and others. From an order denying defendants' motion to set aside and vacate the sale of the mortgaged premises described in plaintiffs' complaint, from the modified judgment entered in accordance with the directions of the supreme court, and from the order granting plaintiffs' motion for a writ of assistance, the defendants prosecute three appeals. Judgment corrected and affirmed.

John B. Kerwin for appellants; H. F. Dusing for respondents.

CHIPMAN, C.—There are three appeals in this case: First, from an order denying defendants' motion "to set aside and vacate the sale of the mortgaged premises de-

scribed in plaintiffs' complaint" (this motion is made on the ground that on a former appeal of the case to this court [128 Cal. 411, 60 Pac. 1034] the judgment of foreclosure was modified by directing a different sale from that provided in the original judgment, namely, a separate sale of the real and personal property); second, from the modified judgment; and, third, from the order granting plaintiffs' motion for a writ of assistance. By stipulation the three appeals are included in, and to be heard upon, one transcript.

The original decree of foreclosure was entered February 27, 1899, and sale thereunder was ordered to be made by a commissioner named in the decree May 24, 1899, and he made the sale on July 1, 1899, in accordance with the order, and on July 3, 1900, he executed and delivered his deed to plaintiffs, as purchasers at the sale. It does not appear at what date the first appeal was taken, but it does appear that no stay bond was given, and hence there was nothing to prevent the sale from taking place. On the twenty-eighth day of April, 1900, the decision of this court was filed, directing certain modifications of the amount found to be due on the mortgage debt, and also further modifying the decree by directing the trial court to "adjudicate separately the amounts due on the real estate described in the first two mortgages and those due on the chattel mortgage, and directing the sale of said real estate and personal property separately, each for the amount due on it. . . . . And, as so modified, the judgment should stand affirmed." The modified decree was entered June 20, 1900. The real estate, however, had already been sold, and was purchased by plaintiffs, as above stated, but the personal property was not sold. It is this sale which defendants seek to set aside by their first motion. Defendants have shown no injury resulting to them from the sale. The restitution which the court may make under section 957 of the Code of Civil Procedure, when the judgment or order is reversed or modified, is not mandatory, but rests in the discretion of the court: Yndart v. Den, 125 Cal. 85, 57 Pac. 761. The only showing made by defendants in support of the motion was that this court had modified the original decree; but no facts are set forth in the affidavit, nor does anything elsewhere appear, from which it can be seen that any injury has come to defendants by the sale, or that they would be

benefited by setting it aside. Some question is raised as to whether the lower court modified the original decree as directed, but, conceding that in some respects the modified judgment does not conform strictly to the directions given by this court, the fact cannot avail defendants on this motion, without it is made to appear that the judgment, when modified as is claimed by defendants it should be, would entitle them to have the sale set aside. No such showing is made. There is no pretense that the real property which was sold failed to bring its full value, or that there was any unfairness in the sale, or that on resale it would bring more than it sold for at the first sale. Nor does it appear that in selling the real property to pay the entire judgment, including the note secured by the chattel mortgage, the price paid was sufficient to pay the real estate mortgages in full. Unless the proceeds of this sale were applied in part payment also of the chattel mortgage, we cannot see that defendants suffered injury, even though it was error, as was held here on the first appeal, to sell the real property in order to pay the judgment, which in fact included the chattel mortgage debt. The facts show that the amount realized from the sale of the real estate was less than the amount due on the real estate mortgages. Defendants have not brought themselves within the principles laid down in Barnhart v. Edwards, 128 Cal. 572, 61 Pac. 176, and cases there cited, and are not entitled to have the sale set aside. It is further claimed that the order of sale is directed to the sheriff, and as it was not executed by that officer, but by a commissioner, the sale is void and should be set aside. This was not made a ground of defendants' motion to vacate the sale, and is presented here for the first time. But, aside from this fact, the decree directed the sale to be made by a commissioner who was named therein, and the decree was copied in the body of the order of sale and formed part of it, thus plainly showing that the order of the court was intended to be executed by the commissioner, as in fact it was; and his authority to act is found in section 726 of the Code of Civil Procedure, as amended in 1893. The code provides that the commissioner, when appointed, shall possess the powers and be subject to the duties of sheriffs in like cases. At most, the

direction of the order of sale to the sheriff was a harmless irregularity: McDermot v. Barton, 106 Cal. 194, 39 Pac. 538.

2. Concerning the modified judgment, which is claimed to be excessive, we can discover no error, except that in the attorney's fee allowed on the chattel mortgage, which should not exceed twenty-five per cent of the amount due at the date of the original judgment, which would be $66.55, instead of $75, as stated in the modified judgment. Defendants make the point that the modified judgment must be reversed because the trial court did not amend the findings, and therefore the modified decree is without support. This court did not direct any amendment of findings. Indeed, if any amendment had been necessary to the modifications, the judgment would have been reversed, and not modified. This court does not direct amendments of judgments where they would conflict with the findings. It can neither make findings nor amend findings.

3. Inasmuch as the sale cannot be set aside, plaintiffs had an undoubted right to a writ of assistance on proper proceedings. No question is raised as to the regularity of the steps taken, except that it is claimed that the commissioner's deed and demand were not served on Arnold Ellenberger, the incompetent, who was the owner of the real property described in the deed. It appeared in the affidavit served with the notice of the application for the writ that one E. Ellenberger was the guardian of the person and estate of Arnold Ellenberger, an incompetent person, and that the said guardian was in possession of the premises, and that George G. Taylor, one of the plaintiffs, presented to the said guardian, both as guardian and individually, the commissioner's deed, and demanded of him possession of the premises. E. Ellenberger appeared and answered in the action as general guardian throughout all the proceedings. It was early determined by this court that a general guardian may appear in an action for his ward without personal service first made on the latter: Redmond v. Peterson, 102 Cal. 595, 41 Am. St. Rep. 204, 36 Pac. 923, and cases cited. At the hearing of the motion for the writ, counsel "appeared specially for defendants." The motion was heard on the showing made by plaintiffs, and the writ was ordered after argument of counsel on both sides. We think the writ was prop-

erly granted. The modified judgment should be corrected in the particular pointed out, and, when so corrected, should, with the orders, be affirmed.

We concur: Cooper, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the trial court is directed to correct the modified judgment by allowing $66.55 attorney's fee on the chattel mortgage note, instead of $75; and thus corrected it is affirmed, as are also the orders appealed from.

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## RAMUS et al. v. HUMPHREYS.

Sac. No. 779; July 24, 1901.

65 Pac. 875.

**Mining Claim—Quieting Title—Defenses.—Where the Plaintiffs** in a suit to quiet title to mining claim had been in actual possession for a number of years, a defense that a claim prior to plaintiffs' had never been abandoned cannot be urged, the defendant not claiming title under such prior claimant; Civil Code, section 1006, providing that occupancy for any period confers title except as to those claiming by prescription, transfer, will or succession.

APPEAL from Superior Court, Siskiyou County; J. S. Beard, Judge.

Suit by Lawrence Ramus and others against Charles E. Humphreys to quiet title. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Warren & Taylor for appellant; J. F. Farraher, J. F. Lodge and J. D. Fairchild for respondents.

SMITH, C.—The plaintiffs sued to quiet title to the mining claim described in the complaint. From the special verdict, adopted by the court, it appears that the land in controversy, at the date of the act of Congress granting to the state the sixteenth and thirty-sixth sections, and at the date of the approval of the United States survey, was mineral land,

and known to be such; that the plaintiffs or predecessors made a valid location of it May 7, 1893, and have ever since been, and now are, in possession of the land; and that the defendant afterward—April 19, 1894—made an attempted location of a portion of the land, but the same was invalid. It is further found that one Hicks made a valid location of part of the claim January 3, 1893—which was prior to plaintiffs' location—but that before the latter event he abandoned the claim. The defendant, it appears, afterward obtained a patent from the state purporting to grant certain government subdivisions, which included the land, but it is, in effect, admitted that the patent conveyed no title: Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611. The sole point made in the case is that the finding as to the abandonment of the mining claim by Hicks is not justified by the evidence. This, however, is a point that cannot be successfully urged by the defendant, who does not claim under Hicks. The plaintiffs were in the actual possession of the land when the suit was commenced, and had been for many years; and this, as against the defendant, who had no title, was sufficient to maintain the action: Civ. Code, sec. 1006. I advise that the judgment and order denying the defendant's motion for new trial be affirmed.

We concur: Cooper, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying the defendant's motion for new trial are affirmed.

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## ANDERSON v. SOUTHERN PACIFIC RAILROAD COMPANY.

L. A. No. 866; July 25, 1901.

65 Pac. 950.

**Public Lands.—In an Action to Recover Purchase Money** paid on contracts for the sale of lands claimed by defendant under grants from the United States, which contracts provided that the money was to be returned in case "it shall finally be determined" that pat-

ents shall not issue to the defendant, a finding that neither the supreme court of the United States nor any court had determined that patents should not issue to the defendants for the land in question was a finding of fact, and not a conclusion of law, the complaint alleging that a contrary finding had been made by the United States supreme court, which allegation was denied.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by C. V. Anderson against the Southern Pacific Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Anderson & Anderson for appellant; Wm. Singer, Jr., and H. V. Reardan for respondent.

VAN DYKE, J.—This action is brought to recover purchase money paid on several contracts given by the defendant to two certain parties, and by them assigned to plaintiff, for the sale of lands claimed by defendant under grants from the United States. Among other things, each of said contracts contains the following clause, to wit: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that as, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be a portion of its said grant, therefore, nothing in this instrument shall be considered a guaranty or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for." The court found "that it has not been finally determined by the supreme court of the United States, or by any court or tribunal, that patents should not issue to the defendant for the lands described in each of the several counts of the plaintiff's complaint herein, or for any part or parcel

thereof." Appellant contends this is not a finding of facts, but a conclusion of law. In this he is clearly mistaken. It is alleged in the complaint "that it has been finally determined by the supreme court of the United States that patents for said tracts of land shall not issue to the defendant company," and without such an averment in the complaint it would have failed to state a cause of action. The answer denies specifically this allegation of the complaint, thus presenting an issue of fact, and a vital one at that. Under this state of the pleadings, the burden was upon the plaintiff to establish by evidence, documentary or otherwise, the affirmative of that issue, and the court by its findings says he did not do so. On an appeal like this from the judgment, upon the judgment-roll alone, without a bill of exceptions or statement, this court can only examine the findings upon which the judgment is based; "all between that and the pleadings drop out of the case": Harper v. Minor, 27 Cal. 109. This rule is thoroughly well settled: Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717; Hayne on New Trials, sec. 229, and cases there cited. In the absence of the evidence, the opinions of courts cited by appellant's counsel are of no avail, for it cannot be said that the facts proved here are identical with the facts proved in such cited cases. Judgment affirmed.

We concur: Garoutte, J.; Harrison, J.

In Bank; January 30. 1902.

67 Pac. 1124.

PER CURIAM.—This is an action by the vendee to recover money upon a contract similar in all respects to the contract involved and considered in the case of Wilson v. Southern Pac. R. R. Co., 135 Cal. 421, 67 Pac. 688. Judgment went for defendant and plaintiff appeals. All the questions raised upon this appeal have been considered in the case of Wilson v. Railroad Co., supra, this day decided; and upon the authority of that case the judgment here appealed from is affirmed.

## GREEN et ux. v. GRIDER et al.

L. A. No. 856; July 24, 1901.

65 Pac. 975.

**Vendor and Vendee.—Plaintiffs Contracted to Sell Certain Land** to two of defendants, payment to be made at a specified time, and, if not so made, the contract to be void, at plaintiffs' option. It was also agreed that certain tracts should be conveyed on payment of the agreed price therefor, and that, if the vendees sold any of the land, they might retain one-fourth of the purchase price, and securities for the remainder should be deposited in bank to secure the performance of their contract with plaintiffs. The appellants purchased certain tracts of the vendees, paying them in part therefor, and tendered the balance to plaintiffs. Held, that plaintiffs were not bound by any payments made to their vendees, since such contract did not make them agents, or authorize them to receive any money for plaintiffs.

APPEAL from Superior Court, Los Angeles County; John L. Campbell, Judge.

Action by R. Henry Green and wife against L. M. Grider and others. From a judgment for plaintiffs and from an order denying a new trial defendants Wallace F. Haas and others appeal. Affirmed.

Walter F. Haas, Chas. Cassat Davis, Cole & Cole and S. O. Houghton for appellants; J. L. Murphy for respondents.

PER CURIAM.—The plaintiffs are the vendors in a contract for the sale of land to defendants Grider and Dow. The suit is against the latter, and purchasers from them, to foreclose their interests under the contract. Judgment went against the vendees and some other defendants by default—and as to the former by stipulation also—and against the other defendants after answer and trial. The last-named defendants appeal from the judgment and from an order denying them a new trial.

The appellants, it appears, prior to the commencement of the suit, made payments, respectively, to the vendees, on account of the purchase money for which they claim credits; and in each case tendered the balance to the plaintiffs, who refused to accept less than the whole of the purchase price. The contention of the appellants is that by the terms

of the contract the vendees were authorized to sell the lands, and that the moneys paid were received by them as agents for the plaintiffs. But this contention is obviously untenable. The contract, in its terms, is an agreement of the vendors to sell and of the vendees to buy the land described in it for the sum of $35,000—$5 in cash, and the balance "to be paid within one year, or as . . . . provided" in the following provisions of the contract. These refer to modes of payment, and to the extension of the time in a certain contingency, and, on the happening of certain conditions, for forfeiture of the contract "at the option of" the vendors; but they leave the vendees—in the absence of plaintiffs' election to declare a forfeiture—still bound to pay the purchase money, or the balance of the purchase money agreed upon, with the interest, as specified, after the expiration of the year. By other provisions the plaintiffs were bound to convey subdivisions of the land on the payment to them of amounts specified as the price of each, but only on such payments. The contract—which was duly recorded—is too clear to be misunderstood on these points, or to require discussion. Nor would it be profitable to review in extenso the arguments of appellants' counsel. Could it be assumed, as claimed by them, that Grider and Dow were agents for the plaintiffs to sell their lands, it would not follow that they were authorized to receive the purchase money stipulated to be paid to the plaintiffs. That would depend on the terms of the writing conferring the authority, which expressly negative any such notion. The provision that the vendees might retain one-fourth of the purchase money, etc., on sale of subdivisions had no reference to the amounts to be paid to the plaintiffs as conditions of conveyance. The price of the land in each case was wholly an affair of the vendees, and they could have retained it all, but for the provision requiring the securities for the balance to be placed in escrow in the bank, as collateral to secure their debt to the vendors. There was, in fact, no privity between the plaintiffs and appellants, except in the agreement that the former would convey to the latter severally the subdivisions of land purchased by them upon the payment to the plaintiffs of the stipulated prices. The judgment and order appealed from are affirmed.

## BORCHARD v. EASTWOOD.

L. A. No. 869; July 24, 1901.

65 Pac. 1047.

**Deeds—Description.—Where, in a Deed, Land is Described as** commencing at the corner of certain sections "in the Chapman tract in the Rancho Santiago de Santa Ana in the county of Orange," the description is sufficient, though the township and range are not stated.

**Deed—Description—Mistake.—Where, in a Deed, the Land** is fully and correctly described, except the number of the township is given as "45" instead of "4," and the land can be identified by the rest of the description, such mistake will not vitiate the conveyance.[1]

**Deed—Description.—Where the Description in a Deed** is all "the lands owned by the grantor" in a certain county, with certain exceptions, it is sufficient to convey all his lands in such county not included within the exceptions.

**Boundary.—Statements of a Former Owner of Land,** and his acts in putting in stakes on an alleged boundary line, are unavailing to establish the boundary, where the adjoining owner was not present, nor had any knowledge of such acts.

APPEAL from Superior Court, Orange County; J. W. Ballard, Judge.

Action by Carl A. Borchard against John Eastwood. From a judgment for plaintiff and from an order denying a new trial defendant appeals. Affirmed.

McKelvey & Bowers for appellant; Williams & Jackson for respondent.

COOPER, C.—Action to quiet title. Plaintiff recovered judgment and defendant appeals therefrom and from an order denying his motion for a new trial.

The premises are described in the complaint as "lying and being in the Rancho Santiago de Santa Ana, county of Orange, state of California, bounded and particularly described as follows, to wit: Beginning at a point 15.825

[1] **Cited** with approval in Crozer v. White, 9 Cal. App. 616, 100 Pac. 132, the court saying that parol evidence is admissible to explain ambiguity in a writing, although not to add to, contradict or vary the instrument.

chains east from the corner of sections 28, 29, 32, and 33, township 4 S., R. 9 W., S. B. M.; thence north 16.93 chains; thence east 5.905 chains; thence south 16.93 chains; thence west 5.905 chains, to point of beginning—containing ten acres. The same being a portion of lots 13 and 14, block F, of the A. B. Chapman tract, as per map made by Frank Lecouvereur in December, 1870." At the close of plaintiff's evidence the defendant made a motion for a nonsuit, which was denied, and it is claimed that the court erred in denying the motion. The argument is that the description contained in certain deeds offered in evidence by the plaintiff, marked Exhibits A, B, C, D and E, does not identify the land described in the complaint. The land is described in Exhibit A as "commencing at a stake 9.92 chains east from the corner of sections 28, 29, 32, and 33, which is the southwest corner of the east one-half of lot No. 13, block F, on the Chapman tract of the Rancho Santiago de Santa Ana, and running thence north 16.93 chains to a redwood post; thence east 16.81 chains to a redwood post; thence south 16.93 chains to iron pin 18 inches long; thence west 11.81 chains to the southwest corner, the place of beginning." The same description is contained in Exhibits C and D. It is admitted that the description in the three deeds is the same, if the lands are in the same township and range as the land described in the complaint; but it is said that, as the deeds mention no township or range, they do not describe the same land. The description in the deeds was sufficient to identify the land without mentioning the township and range. We will not presume that there is another similar description of a tract of land in a different township and range commencing at the common corner to sections 28, 29, 32 and 33 in the Chapman tract in the Rancho Santiago de Santa Ana in the county of Orange. The description was sufficient to identify and locate the land. It has been held that, even if the deed describes the land as being in the southeast quarter, instead of the southwest quarter, of a named quarter section, the description is good if the land can be identified by monuments actually fixed upon the grounds: Helm v. Wilson, 76 Cal. 476, 8 Pac. 604. So it was held that, where a deed did not name the state, county or city in which the land was situated, the description was not void, because without it the property could still be located

and identified: McCullough v. Olds, 108 Cal. 532, 41 Pac. 420. The land was identified by Findley, a surveyor. He said he knew the stake at the common corner to sections 28, 29, 32 and 33, and that the land in question is a part of the Chapman tract. The description in Exhibit E describes the land as "beginning at a point 15.825 chains east from the corner of sections 28, 29, 32, and 33, township 45, range 9 west, S. B. M." Then follows a correct description of the ten acres as in the complaint. It is said that this deed is void because the township is described as "45" instead of "4." This was evidently a mistake. The description identifies the land without the number of the township. It describes the land as being a "portion of lots 13 and 14, block F, of the A. B. Chapman tract, as made by Frank Lecouvereur in December, 1870." The number of the township in this deed may, therefore, be regarded as surplusage. Exhibit B conveyed all the land owned by the grantor in Los Angeles county on the fourteenth day of March, 1881, with certain exceptions. It is not claimed that the land described in the complaint here comes within the exceptions, and the description was therefore sufficient: Pettigrew v. Dobbelar, 63 Cal. 396. It was not error to admit the said deeds in evidence, and the nonsuit was properly denied.

The answer, among other defenses, alleges that the defendant, Eastwood, and his predecessors in interest, have been in possession of the lands described in the complaint for more than five years before the commencement of this action, and that the division line between the lands of plaintiff and defendant has been established by consent of the parties for more than five years before the commencement of the action. The court found against defendant upon this allegation, and found the allegation "to be untrue, and without any foundation or basis whatever except as to the boundary line on the east side of the strip of land described in the plaintiff's complaint." The finding is challenged as being contrary to the evidence. We have examined the evidence, and find that it not only supports the finding, but that no other proper finding could have been made therefrom. When either party comes into court, claiming to be the owner of land, the paper title of which is in his adversary, and claims to be such owner by a parol agreement, or by conduct which estops the other party from claiming the

true line, the burden is upon him to prove clearly such agreement or acquiescence as will comply with the rules of law as herein stated. The evidence shows that one Edward F. Wright owned the land in dispute from 1882 up to December, 1898, the date of the conveyance to plaintiff. His brother, Charles L. Wright, owned the land on the east until about 1892 or 1893, when he sold to one Bancroft. After the sale to Bancroft, he leased the property for several years, and occupied it and farmed it as a tenant of Bancroft. During these years the brothers farmed the two places together, cultivating them and plowing from east to west across the division line. There is no evidence that any boundary line was agreed upon while Charles L. Wright was the owner on the east. There is no evidence that after Bancroft became the owner there was any agreement as to the boundary line, or any claim by Bancroft that he owned any more than the land called for in his deed. In the fall of 1896 the defendant purchased the land on the east from Bancroft, taking only the property described in Bancroft's deed, which did not include the land in dispute. Defendant testified that after he bought from Bancroft about the 1st of January, 1897, Charles L. Wright put in stakes "where he [Wright] said the line was between the two places; that they had always called that the line." At this time Charles L. Wright was not the owner of the land on either side of the disputed line, and hence his statement and acts in putting in stakes can bind no one, as neither plaintiff nor his grantor was present, nor had either of them any knowledge of it. Defendant testified: "When I bought the place, I was given to understand that the line was where it was staked out by Charley Wright." He does not say who gave him such understanding, except what was said by Charley Wright. Certainly it cannot be said what Bancroft, or anyone else, stated to him, in the presence of plaintiff or his grantor, as to the location of the boundary line. Charles L. Wright testified that when he set the stakes he never told defendant that the line he marked off was an acquiesced line or an agreed line, but that he distinctly told defendant that there would have to be a survey made before the true line could be determined. Plaintiff's grantor testified that he never was present when any line was staked out, and never at any time agreed or acquiesced in the line claimed by de-

fendant. Defendant at the time, or about the time, Edward F. Wright was going to sell to plaintiff, said to Charles L. and Edward F. Wright that he would be satisfied with the county surveyor's survey, and would abide by it. He did not then claim any boundary line, or at least he did not say anything about it in his conversation. When plaintiff was about to buy, he asked defendant about the boundary line, and defendant replied that he did not know where it was; and, when plaintiff told him that he would not buy without a survey, defendant replied: "Very well, have a survey made, and I will stand by it; and if it comes my way it will be all right, and if it should go yours, why, I will get more land." In the conversations with plaintiff defendant never mentioned such a thing as an agreed boundary line. Defendant, in his answer, claimed title by adverse possession, but, as the evidence fails to support the claim, it seems to be abandoned, as it is not argued in the appellant's brief. We advise that the judgment and order be affirmed.

We concur: Smith, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## CHAPMAN v. BENT.

L. A. No. 987; July 24, 1901.

65 Pac. 959.

**Pleading.—A Bill of Particulars, Served by Plaintiff** in response to a demand therefor, becomes a part of the complaint.[1]

**Appeal—Conflicting Evidence.—In Order That Findings and Judgment** on conflicting evidence may stand on appeal, such conflict must be one that is material.

**Work and Labor.—Plaintiff Hauled Certain Pipe for a Third Party,** who was under contract with defendant, at so much per ton, upon the terms of that contract, up to a certain date, when he claimed

[1] Cited and followed in Gage v. Billing, 12 Cal. App. 692, 108 Pac. 666, a case in which services charged for specifically in the bill of particulars were not strictly within the allegations of the complaint.

to have commenced working for defendant. Plaintiff testified that he sent defendant word that he would not work unless defendant paid him; that such third party was going away; and on cross-examination he said defendant agreed to pay him for what he had done if he could get an order from such third party, which order was obtained. He testified that nothing was said whether he was to be paid by the day or the ton in making his alleged contract with defendant. A witness testified that plaintiff told him, after he commenced working for defendant, that he was hauling by the ton. Defendant testified that he made no agreement with plaintiff, and that the latter asked him to guarantee the payment for the work done for such third party. Plaintiff submitted a bill of particulars, specifying the number of teams used, and number of days at work, having, at the conclusion of his work, submitted a statement of the number of tons hauled. Held, that a finding that plaintiff performed work and labor for defendant was not justified by the evidence.

APPEAL from Superior Court, Los Angeles County; B. N. Smith, Judge.

Action by D. D. Chapman against A. S. Bent. From a judgment in favor of plaintiff and an order denying a new trial defendant appeals. Reversed.

Jas. Burdett for appellant; Halsey W. Allen for respondent.

HAYNES, C.—Action for work, labor and services. The plaintiff had findings and judgment, and defendant appeals from the judgment and from an order denying a new trial.

In April, 1899, the defendant entered into a contract with the South Mountain Water Company to construct for it a pipe-line near Redlands. On June 1st he entered into a contract with one George Nolan, in writing, to haul the pipe and cement necessary to construct it from the railroad, and distribute it along the line, for the first part of the line, to a specified point, at the price of $1.15 per ton, and for the remainder—the longer haul—at $1.50 per ton; Nolan "to stand all breakages in handling and hauling" the pipe. The plaintiff, D. D. Chapman, was consulted by Nolan in determining the terms upon which the contract should be taken, but, so far as known to Bent, had no interest in it, except that when Nolan commenced work under his contract, about June 9th, Chapman put on several teams, and did hauling thereon for Nolan upon the terms specified in the contract between

Nolan and defendant. The contract between defendant and the water company required the pipe-line to be completed on or before August 1st. Nolan, as well as Chapman, put on several teams, but about the last of June defendant became convinced that, unless more teams were put on, the pipe would not be hauled in time to complete the line within the time limited therefor. Defendant thereupon notified Nolan to put on more teams, and was told that he could not find them, and Nolan thereupon authorized defendant to procure them, and to pay for them at the rate of six dollars per day, the teams so procured to be first paid for out of the money that would be due to him under his contract. Defendant thereupon advertised for teams, and procured sufficient, in conjunction with the teams of Nolan and the plaintiff, to complete the hauling on July 31st. The plaintiff claims that about the last of June or first day of July he quit working for Nolan, and thereafter worked for Mr. Bent; and this action is prosecuted to recover therefor. The action is upon a quantum meruit for work, labor and services in furnishing teams for the defendant for hauling water-pipes, alleged to be of the value of $750. The court found the value to be $456, and gave judgment therefor.

When suit was commenced, the defendant demanded a bill of particulars of plaintiff's claim, and it was furnished, showing the number of teams furnished by plaintiff each day from July 1st to July 26th, both days included. The plaintiff testified, in substance, that he was working for Nolan up to the 1st of July, and after that he worked for Mr. Bent; that he sent word to Mr. Bent by two of his teamsters, Reynolds and Dutch, that, if he wanted him to team, he would have to pay for it himself; that next morning, June 29th, he thought, he saw Mr. Bent, and told him he would have nothing more to do with Nolan, and, if he did any more hauling, he must pay for it himself, and that Bent said he would if he (plaintiff) did the work; that plaintiff continued to work, and put on three more teams, and kept on working until the job was finished. Upon cross-examination he testified that he did not suppose that he could compel Bent to pay for the work he had already done, but that he asked him if he could not see that he got his pay for that, and that Bent agreed to pay him for what he had already done if Nolan would give an order, and

that Bent said he would get an order, and that he commenced work for Bent on the 1st of July; that he had been hauling for Nolan by the ton, but he had no understanding with Bent as to whether he should be paid by the day or the ton, but supposed he was to work by the day, and did not know whether he worked by the day or the ton; that he changed his mind about working for Nolan because Nolan was going to Mexico with his outfit, and Bent was hiring other teams at six dollars per day, and that he knew Bent had obtained an order from Nolan. Reynolds testified that plaintiff sent him to Bent with a message "that, unless Bent would pay him for hauling, that he would not haul any more"; and Bent said he would pay him; that he did not want him to quit hauling. This witness was cross-examined at considerable length, and his attention was called to his deposition taken in the case, and, among other things, the following: "Q. State what message you delivered. A. Mr. Chapman told me to tell Mr. Bent that, unless he would secure his pay for hauling, he wouldn't haul any more, but would take his teams off." Daniel Leibee, called for the defendant, testified that on or about July 16th he was trying to see Bent to get a job of hauling, but did not find him; that Chapman told him he could go on with his team at $6 per day, and said, "My teams are hauling by the ton." The defendant, testifying in his own behalf, testified: That at the time he made his contract with Nolan, Nolan said that Chapman was trying to back out of the whole thing now. That Chapman undertook to explain, but Bent said that it did not concern him, as his bid was from Nolan. That Nolan then said, "Of course, Chapman and I are working together on it." That he (Bent) could not state the exact words, but that he was given to understand that they expected to put on an equal number of teams; and that Chapman, as Mr. Nolan expected to go away to Mexico, would have a general supervision of the work. That the work was commenced June 9th, but it soon began to drag, and he sent Mr. French to Chapman repeatedly to tell him "that he must put on the teams that he led us to believe he would, or else tell us he would not." That he came near forfeiting half of his contract on account of the delay in hauling. That he then arranged with Nolan to get teams by the day; to pay six dollars for four-horse teams, and to

pay them first of all out of moneys due to Nolan. That on July 5th or 6th he met two of Chapman's teams as he was driving along the road in his buggy, and the teamsters told him that Chapman wanted to see him, and he asked, What about? and they said, "He wants to know where his pay is coming from"; and that he replied he would see him. That he did not say that he would pay him, or be responsible for his pay. That he drove over to see Chapman the next day, and he said he wanted to make some arrangement by which he (Bent) would guarantee his pay. That he (Bent) said: "What is the matter with Nolan?" That Chapman replied: "Nolan is all right, but he is going to Mexico, and I don't want to chase him for a year or two to get my money to come through him. I want you to secure it. I want you to guarantee it." That witness replied: "I can't do that, Mr Chapman. I have no contract with you. My deal is with Mr. Nolan." That Chapman then said: "Then I will have to take off my teams, because I won't run any risk." That witness replied: "I don't want you to do that. Why don't you get an order from him?" He replied: "I can't get an order from him." That witness said: "I will. Perhaps I can help you get an order"; and Chapman replied: "If you can get an order, so that I am safe, I will go on and haul." That witness telephoned for an order, and received it on the 8th or 9th. It was dated July 7th. That two or three days after that he passed Chapman on the road, and told him that he got the order, and Chapman replied, "All right," and both drove on, neither stopping the horses. That about ten days afterward Chapman asked whether the order covered the board of his teamsters and his blacksmith, and Mr. Bent replied that he did not know; that he had to pay him out of the money due Nolan when he and Nolan have agreed upon the amount; and that Chapman replied: "All right. Of course, that is all that I could expect." When the work was completed, defendant settled with the teamsters he had procured for Nolan, Nolan being present, and approving the payment to each, and the amount was charged to Nolan. Chapman's account was sent for, and he sent a pencil memorandum of the number of tons hauled, and the amount of the board and blacksmith bills which he had charged to Nolan; but this memorandum did not distinguish between the long and the short hauls.

Afterward, on August 8th, a typewritten bill was presented by Chapman, giving the number of pieces of each size of pipe, with the weight of each in tons, the number of tons of cement, and distinguishing between the long and short haul, and also the amount of the board and blacksmith bills, and the amount of the hauling at the contract price per ton, without deducting breakages, to be $609.50. It was found, however, that, after paying for the extra teams, there was nothing due to Nolan, and defendant had paid out therefor $560 in excess of the contract price. The defendant was strongly corroborated in reference to the order on Nolan, to the effect that Chapman did not want his money to come through Nolan, and that he would put the teams on if he could get an order from Nolan to Bent for his pay, as well as in other matters not so important. Plaintiff was called in rebuttal, and testified that in a certain interview at the Windsor Hotel he did not say that he was not under obligations to Bent, and was not working for him, and explained that by the use of the word "we," in a certain letter, he did not mean that he and Nolan were partners; that they were not partners; and further testified that he got a dollar and a half for all he hauled. No other evidence was given in rebuttal.

When this action was commenced the defendant demanded a bill of particulars, and it was served. It stated the number of his teams used in hauling each day from July 1st to July 26th, inclusive, aggregating ninety days for one team. It contained no statement of the number of tons hauled. The testimony showed that Nolan was to pay him the same compensation for hauling that Nolan was to receive under his contract, and that compensation was a given price per ton. Plaintiff testified, "There was nothing said between Mr. Bent and me whether by the day or by the ton." At the conclusion of the work, however, he furnished a statement giving the total number of tons hauled, but no dates at which any part of the hauling was done, and charged the same price per ton that Nolan was to receive under his contract. Plaintiff's bill of particulars, served in response to a demand therefor, became a part of his complaint, and, if he can recover in this action, he must recover upon the cause of action shown thereby. But plaintiff's statement to defendant and Nolan, made at the conclusion of the work in the settlement between Nolan and defendant,

showed conclusively: First, that he performed no services by the day, as alleged by his complaint and bill of particulars; and, second, that, defendant having obtained an order from Nolan, as desired by plaintiff, he continued to work for Nolan to the end. If, after the 1st of July, he worked for defendant, and not for Nolan, he would either have charged for his teams by the day, specifying the number of days, and the amount or the number of tons hauled before the date of his alleged agreement with Bent, and the number of tons hauled after that date. The plaintiff knew of the order given by Nolan. He said Nolan was all right, but he was going to Mexico, and he did not want "to chase him for a year or two to get his money," and he asked Bent to guarantee his pay; not that he wanted a new contract. On the 8th of August plaintiff presented his typewritten bill, before referred to, in which was charged the whole number of tons hauled by him, but giving no dates at which the hauling, or any part of it, was done. He was then informed by defendant that there was no money due Nolan. Defendant testified: "'He said: 'Why, what about that order? Didn't you expect to pay me when you got that order?' I said, 'I certainly did.' He says, 'You know I told you I would take off my teams unless I was sure of my pay.' I said: 'Yes, you did. But,' I said, 'I supposed, and we all supposed, there would be money not only for you, but a balance for Nolan. Nolan had this contract all through. That was a loss to himself. There is not a dollar coming to him, and you are in the same boat.' He expressed his disappointment, and wanted to know what he was going to do. I said: 'Either you are a partner, or you are working for somebody. You certainly were not working for me.' He replied: 'No, I wasn't working for you. You got that order, and I considered you were going to pay me.'" Defendant further testified that he and the plaintiff went over the figures together; that in none of the conversations was anything said about working by the day, or that plaintiff was working for him. Mr. French, who was present at the foregoing interview, fully corroborated Mr. Bent, and though the plaintiff testified in rebuttal, he denied no part of the conversation on the 8th of August except the statement that he was under no obligations to Bent, and was not working for him.

Respondent contends that there is a conflict in the evidence, and that, therefore, the findings and judgment must stand. But the conflict must be a material one. There cannot be a doubt that the plaintiff continued to haul upon the faith of the order given by Nolan upon defendant. The plaintiff not only testified that Nolan was all right, but that he did not want to follow him for a year or two, and wanted his money to come through defendant; but he also testified that he did not suppose that he could compel Bent to pay him for work already done, nor has he attempted to do so. True, he testified that he went to work for Bent at that time. This was before the order was obtained. That he did go on, relying upon the order, is clear. He did not keep a separate account of his work after that date, and his account was for all the work done, stating only the entire number of tons of each size of pipe in a single item, with no possibility of ascertaining therefrom how much he hauled after his alleged arrangement to work for the defendant, and doubtless for that reason he brought his action charging the defendant by the day for his teams. It is not necessary to discuss the question whether Chapman was Nolan's partner or was a subcontractor or employee. Bent's contract was with Nolan. Mr. French, a witness called by defendant, was cross-examined by the court, and this question was put: "So these extra teams absolutely ate up the whole profit on the $1.50 for the upper and $1.15 for the lower hauling? A. Yes." The suggestion made by this question should be noticed. The plaintiff sought to recover upon a quantum meruit for the use of his teams, and gave evidence that $6 per day for each team was the reasonable value thereof. It is shown that that was the price paid for the extra teams that were employed by defendant for Nolan. The plaintiff, therefore, proved that not more than the reasonable value of the services of those teams was paid, and therefore he was not injured. Besides, the plaintiff testified that nothing was said between him and Bent as to whether he was to haul by the day or by the ton, and added, "Well, it did not make any difference, but amounted to about the same thing." But it is immaterial whether it cost more or not, since it would not affect plaintiff's right to recover from Nolan according to whatever agreement he had with him under which he did the hauling. That defendant, by

completing his contract on time, earned and received a bonus of $500 from the water company is wholly immaterial. He was not bound to share it with anyone. The finding that plaintiff performed work, labor and services for the defendant is not justified by the evidence. I advise that the judgment and order appealed from be reversed and the cause remanded.

We concur: Gray, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded.

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## JOHNSON-LOCKE MERCANTILE CO. v. HOWARD.

Sac. No. 778; July 25, 1901.

65 Pac. 953.

**Sale of Crop of Raisins.—Defendant, in Writing, Authorized Plaintiff** to sell all his crop of raisins at specified prices and terms. Shortly after, plaintiff notified him by letter that sale had been so made, repeating the prices and terms and asking confirmation. Defendant answered that he wished to confirm sale to plaintiff of his entire crop at the prices and terms specified. Plaintiff answered, accepting the modification, making it the purchaser, and inquiring when the raisins would be ready for inspection and shipment. At the time defendant said the crop would be ready, plaintiff sent its agent, who inspected and accepted all except a few boxes, which he claimed were marked a grade too high; but said he would accept them at the grade they actually inspected. Afterward defendant refused to deliver any of the raisins. Held, that there was a contract binding on defendant to sell all his crop to plaintiff at the prices and terms specified.

**Sale—Tender.—Where, on a Contract for the Purchase of Raisins,** plaintiff tendered its check for the proper amount in payment, and no objection was made to the amount or form of the tender, defendant cannot afterward object that the tender was not in money.

**Sale of Crop of Raisins.—Where Defendant Contracted to Sell** his entire crop of raisins, to be Fresno grade, he could not invalidate the contract by marking boxes of a higher quality than the raisins would grade, but plaintiff was entitled to the crop at the actual grades by the standard agreed on in the contract.

APPEAL from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action by the Johnson-Locke Mercantile Company against H. C. Howard. From a judgment for plaintiff and from an order denying a new trial defendant appeals. Affirmed.

E. R. Bush (R. Clark of counsel) for appellant; Hudson Grant for respondent.

PER CURIAM.—Action on contract for the sale and purchase of certain raisins. Plaintiff had judgment, from which, and from the order denying his motion for a new trial, defendant appeals.

The court found the following facts: (1) That on or about July 30, 1898, the plaintiff agreed to buy from defendant, and defendant agreed to sell to plaintiff, the entire crop of muscat raisins of defendant, produced in the year 1898, estimated to be eight carloads, at the following prices; to wit: For two-crown raisins, two and one-half cents per pound; for three-crown raisins, three cents per pound; for four-crown raisins, four cents per pound; for seedless raisins, two and one-half cents per pound—less five per cent of the gross amount computed at the above rates. Whole crop to be boxed in fifty-pound boxes, and to be shipped in October, 1898. Fresno grading. Terms cash on delivery f. o. b. Woodland, Cal. (2) That the crop fell far short of the estimate, there being only 2,192 boxes, as follows: 1,158 boxes of two-crown raisins, 734 boxes of three-crown, 88 boxes of four-crown, and 212 boxes of seedless raisins of the aggregate value of $2,840.02. (3) That on October 31, 1898, plaintiff offered to accept the above-mentioned quantities in fulfillment of defendant's agreement, and tendered him therefor the sum of $2,860.21 (being $20.19 in excess of the amount due), and demanded delivery, but defendant refused to deliver the raisins, or any part thereof, to plaintiff's damage in the sum of $814.72. (4) That the tender made by plaintiff was a draft on plaintiff, payable to defendant's order, for $2,860.21, "which the defendant refused to accept, and refused to deliver the raisins, or any part thereof; but at the time of the tender of the check aforesaid, the defendant made no objection to the said check, or to the amount thereof, or

to the form or manner of the plaintiff's tender." Defendant alleged in his answer, in effect, that negotiations were entered upon in July, 1898, for the purchase by plaintiff and sale by defendant of the raisins in question, and that the negotiations continued until about October 30, 1898, "but at no time was any final and conclusive agreement made or entered into by and between the parties in respect of said crop of raisins, or in respect to all the terms and conditions of such purchase and sale thereof, and said negotiations were never finally consummated or brought to a close until on or about said thirtieth day of October, 1898"; that about said date plaintiff sent its duly authorized agent, one C. C. Kinsey, from San Francisco, to examine said crop of raisins, with a view of finally consummating said negotiations; that said agent made examination of the raisins, and thereupon refused to comply with the terms mentioned during the negotiations, and thereupon defendant "broke off all further negotiations with said plaintiff relative to such purchase and sale of said crop of raisins, and put an end to the same, and refused to have any further dealings with said plaintiff with regard thereto, and then and there so notified said plaintiff; that afterward, to wit on or about October 31st, and at the time mentioned in plaintiff's complaint, the said Kinsey, acting as the agent of said plaintiff, made the offer, tender and demand hereinbefore set out in this answer." As to these allegations the court found: (5) That they "are not true as therein made, but in relation thereto the court finds that on or about the thirtieth day of July, 1898, the plaintiff and defendant entered into negotiations which resulted in the agreement on the part of plaintiff to buy, and on the part of the defendant to sell, all of his crop of muscat raisins of the year 1898, as alleged in plaintiff's amended complaint," and as above stated in findings 1, 2 and 3; "that it is true that on or about the thirtieth day of October, 1898, the plaintiff sent its authorized agent, C. C. Kinsey, from San Francisco to the farm of defendant, to examine said crop and accepted the same." It was further found that the said Kinsey did not refuse to comply with the terms mentioned during said negotiations, nor did he repudiate the offers made by plaintiff during said negotiations; but that it is true that "defendant then and there broke off all further negotiations with plaintiff relative to

said purchase and sale of said crop of raisins, and refused to have any further dealings with plaintiff in regard thereto, and so notified said Kinsey"; and that on October 31, 1898, the said Kinsey made the tender and demand as already shown.

Appellant's points are: (1) That the evidence does not sustain the findings that an agreement was made on or about July 30, 1898; (2) that the finding that such agreement was made is irreconcilable with finding 5; (3) that the evidence does not support finding 5 that there was an acceptance October 30th; (4) that no tender was made.

The transaction must be judged by what the parties did and said in the course of their dealings. Defendant argues the case on the assumption that the agreement found by the court rested entirely on the letters written by the respective parties, one to the other. The contract, as we view the matter, was the result in part of a written memorandum signed by defendant July 18, 1898, in part of letters subsequently passing between plaintiff and defendant, in part of what occurred between the parties when plaintiff examined the fruit, accepted it, and made tender of payment. If the agreement rested wholly on the letters, it would become a matter of law whether they constituted a contract, and we would probably be called upon to state the correspondence in extenso. Not being such a case, there would seem to be no necessity for setting forth all the letters in full, and all the evidence bearing upon the question whether there was a contract as found by the court. The witness Kinsey, who was the agent of plaintiff, and conducted the negotiations on the part of plaintiff, testified that defendant came to plaintiff's office in San Francisco, and stated that he would have certain raisins on his farms near Woodland and Blacks, and desired to make sale of them. Defendant stated the price he wanted. Kinsey wrote in plaintiff's book used for such purposes, July 18, 1898, the following memorandum, which defendant then and there signed: "Henry Howard authorizes us to quote and sell entire crop of raisins within fifteen days, shipment October, 1898, at 2½ cents for 2-crowns, 3 cents for 3-crowns, 4 cents for 4-crowns, seedless 2½ cents; in 50-pound boxes; less 5 per cent. Estimated 8 car loads. Estimate to consist of one-sixth 4-crowns, one-sixth seedless, one-sixth 2-crowns, one-half

3-crowns. Fresno grading." On July 29th plaintiff wrote defendant that a sale had been made in accordance with the authority given in the memorandum of July 18th, repeating the gradings and prices in the memorandum, and closing, "Please confirm, and oblige." To this letter asking confirmation defendant wrote plaintiff on July 30th as follows: "I wish to confirm sale to you of my entire crop of muscat raisins at the following prices: 4-crown, 4 cents; 3-crown, 3 cents; 2-crown, 2½ cents; seedless muscat, 2½ cents; less 5 per cent commission to you. Terms cash. Delivery f. o. b. Woodland." It will be observed that this confirmation by defendant treated the memorandum as a sale to plaintiff, rather than as confirming an authority to sell. In other respects it confirmed the memorandum. Plaintiff again wrote to defendant August 1st, acknowledging his letter of July 30th, in which reference is made to defendant's letter as confirming the sale to plaintiff, apparently accepting the change from an authority to sell to an absolute sale to plaintiff, stating, "This is all in order," but, to avoid any misunderstanding, plaintiff restates the terms of the memorandum with some amplifications, but making no material changes as to prices or other conditions in the memorandum. The shipping point was stated "Woodland or common shipping point," whereas defendant had stated it as Woodland. Hearing nothing in reply, plaintiff again wrote defendant August 16th, asking confirmation, "so that we [plaintiff] may pass contract with our New York people." Defendant replied, August 18th, that, if his confirmation of July 30th was not sufficient, "we had better call the whole thing off," to which plaintiff replied that this was impossible, as the goods had been sold by plaintiff in accordance with the original memorandum. Plaintiff added: "However, let the matter stand just as it is for the present, and we will examine the raisins before shipment, and pay you cash for them against bill of lading as originally agreed. Please let us know by return mail what is the earliest possible date you think you can commence shipping these raisins, as, the earlier they are shipped, the better." Defendant replied August 27th: "In reply will say you wanted so many confirmations on raisin deal that I thought possibly you wished to call it off. I will be ready on my part to deliver the raisins just as fast as I can get

them ready. Can't say how soon, but will try and get at least one car off in September." No further correspondence took place until, September 22d, plaintiff wrote inquiring how defendant was getting along with his drying, and making some other inquiries, and also suggested that the separate grades should be shipped in separate cars. Defendant replied September 24th that to ship each grade separately would delay shipment, and be a great inconvenience to defendant; and he closes, "I shall expect to deliver in car lots as fast as ready, irrespective of grades, as originally agreed upon." Plaintiff replied October 4th, regretting that each grade could not be shipped separately, but said the matter could be arranged so that there would be no additional expense to defendant, and adding: "We will have to suit your convenience. Let us know when you will have the raisins ready for examination, and we will do the needful at once." Toward the end of the month (October) plaintiff again wrote, inquiring how soon some raisins would be ready to ship, and on October 22d defendant replied: "The raisins are not quite all dry yet. Will have most of them ready by the 29th." An effort was made by plaintiff to get defendant to the telephone, which failing, plaintiff on October 25th wrote him, acknowledging receipt of his letter of the 22d, and asking how many raisins defendant would have ready by the 29th. This closed the correspondence, and about October 28th Kinsey went to Woodland on a request by telephone from defendant. The two went to defendant's packing-house at Blacks. There is evidence tending to show that Kinsey examined the raisins, and accepted all of them except eighty-eight boxes marked four-crowns, which were in fact only three-crowns. These he was willing to receive as three-crowns, but would not receive them as four-crowns. He also offered to take them, and ship them, and allow defendant what they brought. Defendant made no statement one way or the other at that time as to these four-crown raisins, but both parties proceeded to get ready to ship the raisins, defendant saying that he could put on four teams, and could deliver in time to make the shipment in October. They then went to Woodland, where defendant had some more raisins in a packing-house. Defendant gave Kinsey a list of the boxes there. Kinsey examined them, and found them satisfactory, and accepted them. Kinsey met defendant

later; had some further talk about shipping; told defendant he must telephone his house the quantities defendant had reported, so that the New York customer could be notified at once. This Kinsey did, and on returning from the telephone office met defendant, who then told him he would not deliver the fruit, and, on demand being made, positively refused. Kinsey, on the next day, again demanded the fruit, and on refusal tendered his check, drawn on plaintiff, for the full amount, as found by the court. This tender included the four-crown raisins at four-crown prices, and covered the entire lot at the agreed prices and as graded by defendant. There was evidence that the eighty-eight boxes of raisins marked four-crowns were in fact only three-crowns.

Defendant relies on Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136, and cases where the same principle there decided was involved. The contract there related to the sale of land, which plaintiff sought to prove by a series of letters written by the parties. The court held that the correspondence failed to show a meeting of the minds of the parties, and that oral testimony could not be received, as plaintiff had failed to prove an agreement in writing, there being no pretense of part performance. The rules of law laid down in that case need not be disputed. Before the court can determine that letters which have passed between parties constitute an agreement, they must show an unqualified acceptance of the actual thing proposed. There must be a proposal squarely assented to. It was so held, and that is undoubtedly the law. But here we may look to the entire transaction from its inception to its close. Not only may we look to the memorandum, and what took place at the time it was signed, and to the subsequent correspondence, but we may look to the acts and words of the parties after the correspondence ceased, and while they were giving a practical construction to their correspondence by their acts and words. Looking to all these facts and circumstances, they show entire agreement on all essential elements of the contract. There was no misunderstanding, even as to the right of plaintiff to examine the raisins, and to insist that they should come up to the grade agreed upon. Defendant cites Benjamin on Sales (6th Am. ed.), 488, to the point that the fact the goods must be examined and paid for later would make no difference as to the binding effect of the agreement. Plaintiff did not agree to

receive, and defendant did not expect to deliver, raisins other than according to Fresno grade, and the evidence was that the eighty-eight boxes of four-crowns did not come up to Fresno grading, and were properly rejected as such. But this rejection did not affect the validity of the contract. The evidence was that they were three-crowns, and plaintiff was willing to accept them as such. Plaintiff also offered to receive them and allow for four-crowns if they could be made to pass as such; and finally plaintiff concluded to accept them as four-crowns, and made tender for them as such. We think that the agreement found by the court clearly resulted from the evidence, and that the evidence sustains the finding.

2. It is doubtful whether any tender was necessary after defendant refused absolutely to deliver the goods. But it is certain that he cannot now be heard to object that the tender was insufficient because made by a check, and not in money. The court found and the evidence was that "at the time of the tender of the check aforesaid the defendant made no objection to said check, or to the amount thereof, or to the form or manner of the plaintiff's tender." Defendant testified: "The reason I refused to deliver the fruit and accept the money was because Kinsey refused to take my four-crown raisins at four-crown prices"; and he testified that he "did not object to the kind of money offered." All objections to the character of the tender must be considered as having been waived: Civ. Code, sec. 1501; Code Civ. Proc., sec. 2076.

3. We discover no irreconcilability between finding 1 and finding 5. Defendant's agreement was to sell his entire crop; but the raisins were to be Fresno grade, and plaintiff had the right to insist upon delivery according to this grade. Defendant could not invalidate the contract by boxing three-crowns and marking them four-crowns. He sold subject to Fresno grading, and, if he put three-crown raisins in boxes marked four-crowns, plaintiff had a clear right to insist that they should be paid for as three-crowns. As plaintiff had the right to these eighty-eight boxes as three-crown raisins, which the evidence showed they were in fact, defendant cannot complain that plaintiff was unwilling to pay for them as four-crowns. The judgment and order are affirmed.

# In re COURSEN'S ESTATE.

S. F. No. 2004; July 27, 1901.

65 Pac. 965.

**Estate of Decedent—Distribution.—Under Code of Civil Procedure,** section 1665, providing that on the final settlement of the accounts of the executor, or at any subsequent time, the court may proceed to distribute the residue of the estate, the court has not jurisdiction to decree distribution of the estate on a petition filed after the final account was filed, but before it was settled; nor is such decree authorized by section 1663, which relates only to partial distribution.

**Estate of Decedent—Distribution.—Where Testatrix Devised to Her Son** all her interest in the estate owned by his father, her first husband, and the remainder of her property to her second husband and his children, a final decree distributing certain specific property to the latter "and any other property not now known or discovered which may belong to said estate, or in which it may be interested," is erroneous, since such provision might carry any after-discovered property belonging to her first husband.

**Estate of Decedent—Distribution.—A Legatee is not Prejudiced** because property in which he has no interest is improperly distributed by the final decree.

**Estate of Decedent—Distribution.—An Executor cannot Appeal** from a final decree on the ground that the property is improperly distributed.

**Executor—Allowance of Account Without Vouchers.**—Where an executor, in his final account, stated that all the money of deceased went into the hands of his coexecutor, and was used in settlement of the estate, and all the legatees interested stipulate that the account of the latter is correct, it is not error to allow the latter's account without vouchers.[1]

**Executor—Account—Payment of Taxes.—Where the Evidence** warrants a finding that an executor did not pay certain taxes charged in his account, and for which he produced receipts, the order disallowing such charges should not be reversed.

**Executor—Compensation.—Where, During the Settlement of** an estate, the property was occupied by the family, including the

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[1] **Cited** in Rice v. Tilton, 14 Wyo. 118, 82 Pac. 581, where the court takes occasion to remark upon the absence of a statute in Wyoming dispensing with vouchers in similar cases.

executor, he should not be allowed extra compensation for his services in excess of his commissions.

**Executor.—In Fixing the Commissions of an Executor,** the inventory value of the property is not conclusive, but the actual market value may be shown, and used as the basis.

**Executor—Commissions.—Where a Small Sum of Money** left by testatrix was received and used by appellant's coexecutor for the benefit of the estate, it was not error to exclude such sum from the computation in fixing appellant's commissions.

**Executor—Commissions.—Where an Executor Acts also as Attorney** for the estate, such services do not necessarily entitle him to extra compensation.[2]

**Estate of Decedent—Distribution—Payment of Taxes.**—Political Code, section 3752, providing that decree of distribution of an estate shall not be made until the taxes are paid, is to protect the revenues of the state, and has no application where the tax has in fact been paid, though the one who made the payment has a tax title to the property therefor.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Appeal by William P. Stout from a decree allowing the account of G. A. Coursen as an executor of the will of Jeanie A. Coursen, deceased, and disallowing the account of appellant as coexecutor, and from a decree of distribution of her estate. Decree settling accounts affirmed, and decree distributing the estate reversed.

G. Gunzendorfer for appellant; Martin Stevens for respondents.

CHIPMAN, C.—Jeanie A. Coursen died testate in 1877, naming William P. Stout and G. A. Coursen as executors, and her will was shortly after duly probated, and letters issued to the executors. An inventory was filed and notice to creditors published. No claims have been presented

[2] Cited in the note in 1 Cof. Pro. Dec. 550, on the right of an administrator, who is an attorney, to charge the estate with the expense of another attorney.

Cited in the note in 2 Cof. Pro. Dec. 369, on the apportionment of commissions when there are two or more administrators.

against the estate. The property consisted of $180 in money and certain real property on Fulton street, in San Francisco, which was occupied by the family of deceased. Respondent Coursen was the second husband of deceased, and appellant, Stout, was her son by her first husband. She left seven children of the second marriage, all of whom had reached majority before the final accounts and the petition for distribution were filed. It appeared by executor Coursen's final account that he received all the money, and he testified that he disbursed it in expenses of administration; but he filed no vouchers. By the will of deceased, appellant was left all the interest she had in the estate of her deceased first husband, Jacob W. Stout, father of appellant. To her children by the second marriage, of whom there were seven, the testatrix devised her real estate, being her separate property, share and share alike. There was a provision of the will that the land should remain a residence for her sons and daughters until the youngest of them should become of age, and "until that time should not be sold, encumbered, mortgaged or otherwise disposed of"; and when that period arrived the land was to be divided among the children equally, or sold, and the proceeds thus divided, "as the majority of my said sons and daughters may then elect." It was also provided that, if any of her sons or daughters should die without lawful issue, his or her portion should go to such of her children as may survive. She requested that the real property described in the will should remain as a home and place of residence for her husband until the time for its disposition should arrive. Two of the seven children died in the city of San Francisco after attaining their majority, and pending administration, namely, Grant, a son, and Geraldine, a daughter; and there was evidence that they were never married. On October 29, 1898, the five surviving children and the coexecutor, Coursen, filed their petition asking that the administration be brought to a close, and for distribution of the estate remaining in the hands of the executors to the five surviving children. Executor Coursen filed his first and final account and accompanying report September 28, 1898, and executor Stout filed his first and final account and report on October 7, 1898. On October 19, 1898, executor Coursen and the five

children filed their objections to the account of executor Stout, and on November 15, 1898, the latter filed objections to the allowance of his coexecutor's account. Thereafter, and on November 15, 1898, the separate final accounts came on to be heard, the hearing was continued to November 18th, and, after being partly heard, the hearing was again continued to December 1, 1898, when executor Stout filed a demurrer to the petition for distribution on the ground that it did not state sufficient facts, and at the same time he filed objections and exceptions by way of answer to the petition for distribution on various grounds. One ground was that there had been no administration of the estates of the two deceased children, and that the court cannot now determine the proportions of the assets of the estate to be distributed to the heirs thereof. Another ground was that his coexecutor, Coursen, had suffered a tax title to become a lien on the premises. Most of the allegations of the petition were specifically denied. The hearing of the accounts was had on December 1, 1898, testimony taken, and evidence, documentary and other, heard, and "the matter of said accounts was submitted to the court for consideration and decision; and thereafter, on the thirtieth day of December, 1898, the said court rendered and made its decision and decree approving and settling the account of said G. A. Coursen, and disapproving and disallowing the account of said William P. Stout, to which said William P. Stout duly excepted; and thereafter, on December 31, 1898, the said decision and decree of said court was filed." It appears from the record that on the 30th of December, 1898, the court overruled the demurrer to the petition for distribution, and "also denied and overruled and disregarded the answer of said Stout to said petition for distribution, to all of which said Wm. P. Stout duly excepted; and thereupon said court made its judgment and decree distributing the estate of said Jeanie A. Coursen, deceased, which said judgment and decree was filed . . . . on the thirty-first day of December, 1898." The decree makes distribution of all the estate—two-sevenths to coexecutor Coursen, husband of testatrix, and one-seventh each to the five surviving children of the second marriage. No distribution was made of the interest of deceased in the estate of her first husband, father of executor Stout, to whom this interest was

bequeathed. The appeal is by executor Stout from the decree allowing the account of executor Coursen, and disallowing the accounts of executor Stout, and from the decree of distribution.

1. In the specifications of errors of law appellant makes the objection that the court was without jurisdiction to make distribution for the reason that the petition for final distribution was not filed with the final account, but was filed afterward, and before the final account was settled. The point was before the court in Re Sheid's Estate, 122 Cal. 528, 55 Pac. 328, and directly decided, and it was held that the court in such case did not acquire jurisdiction. The statutory provisions were fully pointed out in the opinion, and the question clearly elucidated, and the decision must rule this case. Respondents reply that the petition need not be considered under section 1665 of the Code of Civil Procedure, but may be regarded as filed under section 1663 of that code. The latter section relates wholly to partial distribution, and contains provisions with which there was no pretense of complying in the present matter. The petition here was brought under the provisions relating to final distribution, and the decree was for final distribution. Apparently it was just such a case as In re Sheid's Estate. The decree was without authority, and must be reversed.

There are some other questions connected with the decree of distribution which should be noticed. In the will of the testatrix she devises to her son William P. Stout all her right and interest in and to the estate owned by his father, her first husband, at his death. The decree distributes the residue of said estate "hereinafter particularly described" to the second husband of the testatrix and to her surviving children by him, describing the property, "and any other property not now known or discovered, which may belong to the said estate, or in which the said estate may have any interest." There is at least a question whether this provision would not carry any after-discovered property belonging to the testatrix's first husband at his death, and would bind her legatee, Stout, as he is a party to the proceeding. And this doubt is strengthened by the fact that the decree makes no mention of his right to any such property. We think the decree should have made some disposition of this asset of the estate.

It is objected by appellant that under the terms of the will the court could not decree any of the property to the testatrix's surviving husband. This question might have importance if legatee Stout claimed any interest in the property; but, as he makes no claim to any property except that specifically devised to him, and as the other devisees could consent to distribution to their father, as they seem to have done, the decree in this respect was not prejudicial to appellant.

Appellant makes the objection that there could be no distribution of the interest of the deceased children, Grant and Geraldine, in the estate, until after separate administration of their several estates. We see no objection to the decree in this regard. Moreover, appellant, as executor, cannot be heard as to the distribution made: Bates v. Ryberg, 40 Cal. 463. See, also, In re Welch's Estate, 106 Cal. 427, 39 Pac. 805, where certain limitations of the rule are pointed out, within which appellant does not bring himself. As legatee he is not aggrieved, because he makes no claim to any share of the deceased children's property.

2. All the legatees, except appellant, filed written consent to the approval of the account as rendered by executor Coursen. In appellant's account, which is verified, he states that the only money left by deceased, to wit, $180, was taken possession of by his coexecutor, "and by him used in paying necessary expenses incurred during the administration of the affairs and business of said estate." All parties agreeing that the money was properly expended, and executor Stout not being interested as a legatee of and making no claim on the money, there was no error prejudicial to appellant in allowing the account without vouchers. Appellant was secured for any commissions to be allowed him and for attorneys' fees by the real property to be distributed, and petitioners offered in their petition to pay all commissions and charges.

3. Appellant's account consisted of sundry charges for moneys alleged to have been paid out by him for taxes on the real property of the estate and for improving the street in front of the property, aggregating $956.32. He produced certain tax receipts, showing that the taxes had been paid to and received by the tax collector; but they do not show on their face who paid the money. Appellant testified that he

paid a considerable portion of it. There is evidence contradictory of his testimony, however, and on the question of payment by him the evidence is conflicting. From the testimony in the case the court was warranted in disallowing appellant's claim for the disbursements alleged in his account.

4. The court allowed one-half the commissions to appellant on the basis of $20,000 as the value of the estate accounted for by executor Stout, being one-half of $920, and the court also allowed to executor Scott $50 as attorneys' fees. It is claimed by appellant that he should have been allowed extra compensation for services as executor, and also should have been allowed a larger attorney's fee. We can discover no grounds for any greater allowance. The real property was in the possession of the family all the time, and during much of which appellant was an inmate of the family, and occupied a room in the dwelling. Appellant claims that the estate was of greater value than $20,000. The inventory returned the value of the estate at $35,180. But a recent reappraisement placed the value of the real property at $18,187.50. There was evidence that the largest offer made for the property was $20,000, and a witness familiar with real estate values in San Francisco placed the value at $20,000. As to the $180, no part of this money ever came into the hands of appellant, or under his control, as coexecutor, nor was it disbursed by him. His coexecutor had it in his possession at the death of Mrs. Coursen, and paid it out for the benefit of the estate. We cannot see that the court erred in excluding it from the amount on which appellant was allowed commissions: Hope v. Jones, 24 Cal. 90. The inventory value of the property is not conclusive in fixing the compensation to the executors: In re Simon's Estate, 43 Cal. 543; In re Fernandez's Estate, 119 Cal. 579, 51 Pac. 851.

5. During the early years of the administration, appellant acted as attorney and coexecutor, but this did not necessarily entitle him to extra compensation. We have examined the evidence bearing on the extra services claimed to have been performed by appellant, and are of the opinion that the court rightly refused additional compensation.

6. Appellant's attorney appeared for appellant in 1898, and the only service performed by him, as shown by the evidence, was in the preparation of appellant's account and attending at its hearing, and in opposing the coexecutor's

account and the petition for distribution. Under the circumstances described, we cannot say the court erred in fixing the attorney's fee at $50.

7. Objection was made to the decree on the alleged ground that the taxes on the property were not paid. It appeared that the executors had procured the taxes to be paid by other persons, who hold tax deeds on some portion of the property, confessedly for the benefit of the owners. The object of the statute (Pol. Code, sec. 3752) in requiring all taxes to be paid before distribution can be made is to protect the revenues of the state. As the tax was in fact paid, it was no objection to distribution that there was an outstanding tax title in the person who paid the taxes. It is advised that the decree settling and allowing the final account of coexecutor Coursen and disallowing the account of coexecutor Stout be affirmed and that the decree of distribution be reversed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the decree settling and allowing the final account of coexecutor Coursen and disallowing the account of coexecutor Stout is affirmed and the decree of distribution is reversed.

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## LUCHETTI et al. v. FROST et al.

Sac. No. 765; July 27, 1901.

65 Pac. 969.

**Vendor and Vendee—Offense of Selling Land Twice.**—A contract to sell land free of encumbrance, which the vendor has previously contracted to sell to another, is not in violation of Penal Code, section 533, providing a penalty for selling land which has been bargained to another with intent to defraud previous or subsequent purchasers, where the previous contract is recognized as an encumbrance which the vendor agrees to settle.

**Specific Performance—Tender.—Defendant Contracted to Convey Land** to plaintiff free of encumbrance on payment of the purchase price on or before a certain day. Plaintiff had the money, and offered to pay the price before the day named, and demanded a con-

veyance; but defendant had not removed the encumbrances, and on the day after the date named conveyed to another. Held, that an actual tender by plaintiff was not necessary to enable him to maintain an action for specific performance, since defendant was then unable to perform.[1]

**Specific Performance.—Where There is Evidence Supporting a Finding** of fact by the trial court, the finding should not be disturbed because there is also conflicting evidence.

APPEAL from Superior Court, San Joaquin County; Edward I. Jones, Judge.

Action by Luigi Luchetti and another against W. R. Frost and others. From a judgment for plaintiffs and from an order denying a new trial defendants appeal. Affirmed.

Ansel Smith, Gus R. Grant and A. H. Carpenter for appellants; Nicol, Orr & Nutter for respondents.

SMITH, C.—Appeal from a judgment for the plaintiffs and from an order denying the defendants' motion for a new trial. The suit was for the specific performance of a contract to the plaintiffs by the defendant Frost for the sale of land. The facts, as alleged in the complaint and found by the court, are as follows: By the terms of the contract, which was executed May 26, 1898, the defendant Frost agreed to sell and the plaintiffs to buy the land in question for the sum of $3,500, to be paid $5 at the time of the contract, which was paid accordingly, and the balance, $3,495, on or before June 2, 1898, Frost agreeing, on payment, to convey free of encumbrances. Time was made of the essence of the agreement. At the time of the contract the land was subject to two mortgages, the principals aggregating $3,170, and to a written option to purchase, given by Frost to one Rhodes, which was to expire June 13, 1898. On the 31st of May, 1898, the plaintiffs offered to pay the amount due upon receiving a deed conveying to them the property free of encumbrances, as provided in the contract; but it is found the

[1] **Cited** and followed in English v. Mound House Plaster Co., 192 Fed. 719, where, the vendors having put it out of their power to perform the contract, it was held that a tender by the vendees would have been useless, and therefore the absence of allegation of tender in their complaint was no defect.

defendant then and there neglected and refused to execute such conveyance, and has ever since neglected and refused to do so. Afterward, on the second day of June, 1898, the contract was recorded by the plaintiffs. The following day (June 3, 1898) Frost made a conveyance of the land to the defendant Noble, the agent of the defendant Solari, to whom on the same day the land was conveyed, and by whom the land was mortgaged to the defendant Harvey, June 7, 1898, for the sum of $4,000. It is also found (though the fact may be regarded as immaterial) that on the third day of June (the day of the deed to Noble) Frost had recorded a written cancellation, or attempted cancellation, of the contract with plaintiffs. The judgment was for a conveyance of the land in question by Solari to the plaintiffs on the payment of the balance of the purchase money, $3,495, free of encumbrances suffered by him or the defendant Frost (the latter, presumably, having been paid), and for the cancellation of the mortgage to Harvey upon the payment thereon of the said sum.

Numerous points are urged for reversal, but they may be reduced, in effect, to the following, viz.: That the contract was in violation of section 533 of the Penal Code, that there was no tender of the purchase money by the plaintiffs, and that the findings of the plaintiffs' offer to perform and the defendants' refusal were not justified by the evidence. The first point hardly requires consideration. The agreement was for the sale of the land free of encumbrances, among which the option held by Rhodes was recognized as one. It was understood that this was to be settled by Frost, and on the sale to Noble it was in fact settled for $100. With regard to tender, none was necessary until Frost was in condition to convey as provided in the contract. The plaintiffs' offer, accompanied by the ability and will to perform, and the demand on the defendant Frost for performance on his part, was all that could be done by them at the existing stage of the transaction, and was sufficient. With regard to the sufficiency of the evidence to justify this finding, the most that can be said in favor of appellants' view is that it was conflicting. But even this can hardly be claimed. The plaintiffs and their witnesses all declare that the offer to perform was made at the interview of May 31, 1898, and that it was accompanied with no conditions, except that encumbrances should be re-

moved. Two of the witnesses for defendants testified that the plaintiffs required the performance of another agreement, relating to certain land that it was thought desirable to have; but the date to which this testimony relates is not fixed, nor can it be inferred that it related to the particular occasion spoken of by plaintiffs' witnesses. I advise that the judgment and order appealed from be affirmed.

We concur: Chipman, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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## WILSON v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

S. F. No. 2618; July 27, 1901.

65 Pac. 1027.

**Appeal.—Where an Appeal from a Judgment of the Police** court to the superior court had been taken, and papers filed in the superior court many months, the fact that the court decided the appeal without having first made an order submitting it to decision does not render the judgment void.

**Appeal.—Where the Superior Court Inadvertently Rendered** judgment on an appeal from the police court, without first making an order submitting the appeal for decision, the judgment may be set aside on motion, but cannot be treated as void, and a second review and decision of the same question be compelled by mandate.

On petition for rehearing. Denied.

For former opinion, see ante, p. 713, 65 Pac. 575.

GAROUTTE, J.—By reason of the complicated facts disclosed by the record in this proceeding, possibly some erroneous statements have crept into the opinion heretofore rendered; but, as to any of those statements, they do not appear to materially affect the soundness of the conclusion to which the court arrived. In answer to the petition for a rehearing it

may be further suggested that it appears, first, by the affidavit of the judge of the court, in his answer to the petition for the writ, that he decided the appeal from the judgment upon September 7th. It next appears by the entry made in the record at that time that he decided the appeal from the judgment. It next appears by the order made by the court upon December 26th that he decided the appeal from the judgment upon September 7th; for at the hearing upon December 26th the very question at issue was whether or not the order made upon December 21st was within the jurisdiction of the court, and at the hearing upon the 26th it was held that the order of the 21st was void by reason of the fact that the court had theretofore, upon September 7th, decided the question involved in the hearing of December 21st. It may, then, be said that it conclusively appears that the court upon September 7th decided the appeal from the judgment. The remaining question is then presented, Was that decision absolutely void? For, if it was not absolutely void, certainly mandate will not run against the court to compel it to again decide the same question. It is insisted that such judgment was absolutely void, because at the time it was rendered there had been no order made submitting that appeal to the court. It, however, does appear by the record that the appeal from the judgment had been taken many months prior to September 7th, and that the papers on appeal from the judgment had been filed in the superior court months prior to September 7th. Under these circumstances, the mere fact that the court decided the appeal without having first made an order submitting it for decision, we think to no extent renders the judgment void. It may be said that the very fact of the court assuming jurisdiction of the question and deciding it was, in effect, an order of submission. If these be the facts, then probably it may be said that the judgment was inadvertently rendered, but the inadvertent rendition of a judgment does not necessarily render that judgment void. A judgment inadvertently rendered may be set aside upon motion, but we know of no case where it has ever been held that such a judgment may be treated as absolutely void, and mandate run against a court to compel a second review and decision of the same question. For these reasons, I think the petition for rehearing should be denied.

## WEBB v. WINTER et al.*

Sac. No. 815; July 29, 1901.

65 Pac. 1028.

**Will.—A Husband Owning Community Property** died, and by his will left all his property to his wife for life, remainder to his children. She borrowed money, and mortgaged the premises as if owner in fee. Held, that on foreclosure the purchaser acquired the widow's undivided one-half and her life estate in the other half.

**Mortgage—Community Property.—Where Property is Sold on Foreclosure** of a mortgage executed by a widow, who owned one-half thereof as community property and the other half for life under her husband's will, of which she was executrix, the remainder being devised to their children, the purchaser at such sale cannot acquire title to the interest of the children by adverse possession, pending administration of their father's estate, or without giving notice that he claimed absolute title to the whole property.

**Mortgage—Life Estate.—In an Action to Foreclose a Mortgage** given by the owner of an undivided half of the premises and life estate in the other half, the owners of the remainder after expiration of the life estate were made parties defendant and defaulted. Held, that the foreclosure sale conveyed only the interest of the mortgagor, and did not affect the title of the other parties.

**Will—Power of Sale.—Where a Will Authorizes** the executor to sell the property, if necessary for support of the widow and children, such authority does not include power to mortgage.

**Ejectment.—A Demand is not Necessary Before Bringing** suit to recover land, where defendants deny plaintiff's title, and set up title in themselves.

APPEAL from Superior Court, Tehama County; Edward Sweeny, Judge.

Action by Earll H. Webb, administrator with the will annexed of the estate of John E. Church, deceased, against Mary Winter and another. From the judgment for plaintiff and from an order denying a new trial defendants appeal. Affirmed.

H. P. Andrews (Grove L. Johnson of counsel) for appellants; Webb & Espey for respondent.

*For subsequent opinion in bank, see 135 Cal. 455, 67 Pac. 691.

COOPER, C.—This action was brought by plaintiff, as administrator with the will annexed, to recover from defendants possession of lot 22, block 12, in the town of Red Bluff. The case was tried before the court, findings filed and judgment entered for plaintiff. Defendants made a motion for a new trial, which was denied, and this appeal is from the judgment and order denying the motion. There is practically no controversy about the facts, which are substantially as follows: John E. Church, during his lifetime, was the owner of the premises described in the complaint, the same being community property. On January 13, 1886, said Church died, leaving a will, by the terms of which he appointed his wife, Elizabeth, executrix without bonds. He left surviving him, besides his widow, two children—Flora C. Pryor, a daughter, and E. C. Church, a son. By the terms of the will the deceased left all his property to his surviving wife during her life, and at her death to be equally divided between his children. The will authorized the executrix, if necessary for the support of herself and children, to grant, bargain, sell and dispose of all of said estate at private sale, without any order of court therefor. Elizabeth Church qualified as executrix, letters were issued to her, and she continued executrix until her death, September 22, 1898. On February 21, 1890, the said Elizabeth Church borrowed $2,500 from defendant Mary Winter, and also $2,500 from George G. Winter, her husband. To secure the said loans, she, without any order of court, and in her individual capacity, executed mortgages to said defendant Mary Winter, and to her husband, George G. Winter, upon said premises, which were described in said mortgages as though said Elizabeth Church were the owner in fee thereof. George G. Winter subsequently died, and defendant Mary Winter succeeded to his title, thus becoming the owner of both mortgages. The indebtedness not having been paid, nor the interest, the defendant Mary Winter, in 1893, commenced proceedings to foreclose the said mortgages, making Elizabeth Church in her individual capacity defendant. The two surviving children, Flora C. Pryor and E. C. Church, who were then each of lawful age, were also made defendants, the complaint alleging that they had, or claimed to have, some interest in or to said premises, which interest was alleged to be subsequent to and subject to plaintiff's lien. The defend-

ants in said foreclosure proceedings each made default, and on June 26, 1893, a decree of foreclosure was duly entered in favor of plaintiff therein and against said Elizabeth Church, E. C. Church and Flora C. Pryor. On August 30, 1893, the premises were sold to defendant Mary Winter by virtue of the said decree and order of sale, and a certificate of sale issued and delivered to her, and she thereupon entered into, and ever since has remained in, possession by herself and her tenant, Sobel, who is made a codefendant herein. On March 2, 1894, a deed was issued to defendant Mary Winter by the commissioner who made the sale under the foreclosure proceedings. Since her purchase on August 30, 1893, defendant Mary Winter has paid the taxes levied and assessed upon the premises, except the second installment of taxes for the year 1898, which were paid in November, 1898, by the plaintiff herein. On September 22, 1898, the said Elizabeth Church died, leaving the estate in process of settlement. At the time of her death there had been no distribution, and no final account filed or settled. On November 19, 1898, the plaintiff was appointed administrator with the will annexed of the said estate, letters were issued to him and he ever since has been such administrator. This action was commenced July 31, 1899.

It is provided in section 1452 of the Code of Civil Procedure: "The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against anyone except the executor or administrator; but this section shall not be so construed as requiring them so to do." And in section 1581: "The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession

of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title." The property belongs to the estate of John E. Church, deceased. The estate has not been settled, nor has the property been delivered over to the heirs or devisees. The said Elizabeth Church was the owner, subject to administration, of an undivided one-half of said property as community property, and of the whole of it during her lifetime. The mortgage was a conveyance, by way of security, of all her title, subject to the ordinary purposes of administration, to the claims of creditors, and the expenses of administration. The sale under the foreclosure of the mortgage related back to, and conveyed the title of, Elizabeth Church, as devisee and heir of her deceased husband, which she had at the time she executed the mortgage. The mortgage was of the title and right of the mortgagor—no more, no less. She could mortgage her own interest in the property. She could not mortgage the interest or title of others, except by order of court, which she did not have. The defendant Mary Winter, by purchasing at the foreclosure sale, succeeded to all the title of Elizabeth Church in and to the property, but not to the title of Flora C. Pryor or E. C. Church. They did not mortgage their interest, and Elizabeth Church did not, because she possessed no such power. Great stress is placed upon the claim that defendant Mary Winter has acquired title by adverse possession. We think the claim cannot be maintained in this action. Elizabeth Church was not the sole owner of the property, but only a tenant in common with the children, the whole thereof being subject to administration. Defendant Mary Winter, by the foreclosure, has only succeeded to the rights of her mortgagor as one of the heirs. The law charges her with notice of the fact that her mortgagor was not the sole owner of the property, but only a tenant in common with her children. In such case as successor in interest of all of the heirs, she cannot acquire title by adverse possession pending administration: In re Grider, 81 Cal. 571, 22 Pac. 908; Dunn v. Schell, 122 Cal. 627, 55 Pac. 595. Elizabeth Church held the property in trust for the purposes of administration and for the children named in the will. Although holding the property as trustee, she also held an interest in it in her

own right. By the loss of this interest, through mortgage and foreclosure, she did not destroy the interest she held as trustee. She never repudiated the trust, or gave notice of repudiation. Defendant Mary Winter took the title of Mrs. Church subject to the trust created by the will. She never gave any notice to the representative of the estate in her official character, nor to the children named in the will, of any claim to the property as absolute owner. By the foreclosure proceedings she could not affect any title of the children paramount to the mortgage. As she did not, in such foreclosure proceedings, make the executrix of the estate of Church in her official capacity defendant, we must presume she was not claiming as against the representative of the estate. The foreclosure of the mortgage, given by the executrix as an individual, is perfectly consistent with the property still retaining its trust character as to the estate and the other heirs.

It is urged that the children are estopped by the foreclosure decree, as they were of age, and made default. But this position cannot be maintained. The children did not appear and put in issue their title. It is well settled that a sale under foreclosure proceedings transfers the title as it existed at the date of the mortgage, and that any paramount title existing at the date of the mortgage in third parties is not affected by the decree of foreclosure. It only forecloses the title of the mortgagor and any rights that have accrued subsequent to the making of the mortgage: McComb v. Spangler, 71 Cal. 422, 12 Pac. 347; Ord v. Bartlett, 83 Cal. 429, 23 Pac. 705; Sichler v. Look, 93 Cal. 602, 29 Pac. 220.

The claim that the clause in the will authorizing the executrix to sell the property was sufficient authority to authorize the execution of the mortgage cannot be upheld. The deceased, while willing that the property might be sold, if necessary, for the support of his children and his widow, might not have been willing that it should have been mortgaged. A sale is supposed to be a transfer for full value. A mortgage is a conveyance by way of security, and may result in the loss of the property for only a small part of its value. It is said by Woerner, in his work on the American Law of Administration, second edition, volume 2, pages 731, 732, section 345: "It may be stated, as a general proposition, that neither

executors, unless specially thereto authorized by will, nor administrators, have the power to bind the estate of the deceased by borrowing money. . . . . The power to sell real estate, given in a will, does not necessarily include the power to mortgage it. Such a power must be exercised to the extent and in the manner specified. It must accomplish the purposes had in view by the testator." To the same effect are the following authorities: 2 Perry on Trusts, sec. 768, and cases cited in note 4; Hoyt v. Jaques, 129 Mass. 286; Golinsky v. Allison, 114 Cal. 460, 46 Pac. 295; Hawxhurst v. Rathgeb, 119 Cal. 532, 51 Pac. 846.

The eighth finding is supported by the evidence, except that the court finds that the mortgages were made to defendant Mary Winter. One of them was made to her husband; but, as she afterward became the owner of it, the finding is wholly immaterial. The result would be the same if the fact had been found precisely as it was.

Finally, it is claimed that finding 13, to the effect that plaintiff made demand upon defendants for possession of the property November 19, 1898, is not supported by the evidence. Counsel say in their brief, "Demand was only made before the beginning of the suit, and no date is given in the evidence." The date is wholly immaterial. If demand was necessary, it could be made any time before beginning suit. In this case, as the defendants deny plaintiff's title, and affirmatively set up title in themselves, no demand was necessary. The judgment and order should be affirmed.

We concur: Smith, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## In re AVERILL'S ESTATE.

S. F. No. 2623; August 13, 1901.

66 Pac. 14.

**Guardian—Account.—The Administrator of the Estate of a deceased** incompetent may contest the final account of the guardian of such incompetent.

**Guardian—Allowance for Board and Care of Ward.**—The matter of allowance to be made to a guardian for the board and care of his ward is in the discretion of the court, and its award should not be set aside, when apparently sufficient, though there is uncontradicted testimony favoring a larger amount.

**Guardian.—Where a Guardian Loans the Money** of his ward on the sole credit of the borrower, it devolves on him to show that he acted in good faith and with due prudence, since, in the absence of such evidence, the presumption is otherwise.

**Guardian—Account.—In Proceedings to Settle** a guardian's account express findings are not necessary, since all facts necessary to sustain the judgment of the trial court will be presumed.

APPEAL from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Appeal by Silas Shirley from an order settling his final account as guardian of Clark Averill, an incompetent. Affirmed.

Wm. H. Johnson and O. O. Felkner for appellant; Chas. H. Hogg and H. F. Dusing for respondent.

SMITH, C.—The appellant, Silas Shirley, was guardian of the person and estate of Clark Averill, an incompetent, now deceased, and appeals from an order of the court settling his final account. The account was contested by the respondent, H. F. Dusing, who was executor of the will of the deceased incompetent, and the point is made that he had no right to contest. But this is manifestly untenable: Code Civ. Proc., secs. 1765, 1754, subd. 3, 1789, 1635.

Two items of the guardian's account partially disallowed by the court were for board and lodging furnished and personal services rendered by him to the incompetent from June 10 to October 31, 1897 (one hundred and thirty-six days), at the rate of $5 per day, aggregating $680, and for like services

rendered the incompetent by the wife of the guardian for the same period at the rate of $2 per day, aggregating $272. For these items the court allowed for the former for services $250 and for board $95, aggregating $345, and for the latter $125, and disallowed the balance. The amounts allowed by the court were, we think, sufficient, and even liberal. In these matters much must be left to the discretion of the court; nor is its discretion limited by the fact that there was uncontradicted testimony of witnesses as to their opinions that a larger amount should have been allowed: In re Lux's Estate, 100 Cal. 593, 35 Pac. 341; Freese v. Pennie, 110 Cal. 469, 42 Pac. 978; In re Beisel's Estate, 110 Cal. 276, 40 Pac. 961, 42 Pac. 819.

Another item of credit claimed by the appellant, and disallowed by the court, was the loan of $800 to O. O. Felkner and E. L. Felkner, on their promissory note of date September 15, 1899, payable one year after date. There was no evidence bearing on the question of the adequacy of this security, or upon the prudence of making the investment. But loans by guardians or other trustees upon personal security, and especially loans upon the sole credit of the borrower, have always been discountenanced by courts of equity, and are certainly irregular and out of the usual course of business. In such transactions, therefore, it must be held that it devolves upon the guardian to show that he acted in good faith, and with due circumspection and prudence. In the absence of such evidence, the presumption is otherwise: In re Cardwell, 55 Cal. 137; In re Carver's Estate, 118 Cal. 73, 50 Pac. 22; Woerner on Guardianship, sec. 64; 2 Pom. Eq. Jur. 1074; 15 Am. & Eng. Ency. of Law, 2d ed., 107, and authorities cited. In the California cases cited there were express findings that the loans there in question were made on inadequate security, and our attention is called by the appellant to the fact that in this case there is no such finding. But in proceedings of this nature express findings are unnecessary: In re Adams' Estate, 131 Cal. 415, 63 Pac. 838. And all facts necessary to sustain the judgment or order of the lower court will be presumed. I advise that the order appealed from be affirmed.

We concur: Haynes, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

## ALCORN et al. v. BATTERMAN et al.

Sac. No. 946; August 13, 1901.

66 Pac. 17.

**Power of Attorney—Deed in Excess of Authority.**—Where a deed executed by an agent acting under a power of attorney is in excess of the power granted, the deed is void.

APPEAL from Superior Court, San Joaquin County; Edward I. Jones, Judge.

Action by James Ben Alcorn and another against H. H. C. Batterman and others. From a judgment for defendants, plaintiffs appeal. Reversed.

J. B. Hall (J. F. Ramage of counsel) for appellants; Budd & Thompson and James H. Budd for respondents.

SMITH, C.—This suit was brought to quiet the title of the plaintiffs to the lands described in the complaint, and to recover possession. The plaintiffs' deraignment of title is the same as in their suit against the defendants Buschke; 133 Cal. 655, 66 Pac. 15. The defendant Batterman deraigns title under two deeds executed by Kyle under the power of attorney involved in the former case—the one to John E. Budd for the recited consideration of $10; the other, for the same recited consideration, to Sebree, one of the principals in the power. The allegations of the complaints in the two cases are substantially the same. In the former case it was held that the deed executed by the attorney to the defendants' grantor was void, as being in excess of the power granted, and the conclusion will apply equally to the deeds here involved. The judgment should therefore be reversed, on the authority of the case cited, and the cause remanded, with directions to the lower court to overrule the demurrer to the complaint.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed, on the authority of the case cited, and the cause remanded, with directions to the lower court to overrule the demurrer to the complaint.

## GARDNER v. STARE et al.*

L. A. No. 993; August 14, 1901.

66 Pac. 3.

**Appeal.—A Motion to Dismiss an Appeal from an Order Denying a new trial because such motion was not served on all the parties who would have been adversely affected by the granting of the motion will not be considered, since it involves the merits of the appeal and an examination of the record.**

**Appeal.—Where, in an Action Concerning the Separate Property of a wife, whose husband defaulted, it appears that pending a motion for a new trial such wife died, whereupon all parties consented to the substitution of her administrator, and notice of appeal was served on him, a motion to dismiss the appeal on the ground that such husband and wife had not been served with notice of the appeal is of no avail.**

APPEAL from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by William Gardner against Catherine Stare and others. From a judgment in favor of plaintiff, and an order denying a new trial, Adeline Johnson appeals. Plaintiff moves for a dismissal of the appeal. Motion denied.

C. N. Wilson and Leslie R. Hewitt for appellant; Dunnigan & Dunnigan, Cole & Cole, Fred. L. Wood, Graves, O'Melveny & Shankland and Goodrich & McCutchen for respondents.

BEATTY, C. J.—This is a motion to dismiss an appeal from an order denying a new trial. The grounds of the motion are: First, that the notice of appeal was not served on parties who would be adversely affected by a reversal of the judgment; second, that the notice of motion for a new trial was not served upon all the parties who would have been adversely affected by the granting of the motion.

The second ground of the motion involves the merits of the appeal and an examination of the record, and is therefore not to be considered on a motion to dismiss. It relates to matters arising prior to the order appealed from: Centerville etc. Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; In re Ryer's Estate, 110 Cal. 559, 42 Pac. 1082.

*For subsequent opinion, see 135 Cal. 118, 67 Pac. 5.

The first ground of the motion is answered by an affidavit showing a sufficient service of the notice of appeal as to the parties named in the motion. The objection was that Catherine Stare and John Stare, her husband, had not been served. The record shows that the action concerned the separate property of the wife, and that John Stare never had any interest in the litigation. He made default, and the judgment does not affect him in any way. It is further shown by certified copy of stipulation of the parties, and by affidavit of appellant's attorney, that Catherine Stare died pending the motion for new trial, that all parties consented to the substitution of her administrator, and that the notice of appeal was served upon the administrator. The motion is denied.

We concur: McFarland, J.; Harrison, J.; Van Dyke, J.; Henshaw, J.

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## SWORTFIGUER v. WHITE et al.*

S. F. No. 2732; August 23, 1901.

66 Pac. 80.

**Appeal.—Where Two Appeals are Taken by the Same Party** from the same judgment, and no question is raised as to the validity of the first appeal, the second appeal should be dismissed.

**Appeal—Notice.—Where There is No Properly Certified Copy** of the notice of appeal in the record of the appeal, the appellant, on motion, may be authorized to complete the record by supplying the defect.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Esther E. Swortfiguer against Charles G. White and others. From a judgment for defendants, plaintiff took two appeals. Second appeal dismissed.

Pringle & Pringle for appellant; N. H. Barrows for respondents.

*For subsequent opinion, see case following.

TEMPLE, J.—It appearing that two appeals have been taken from the same judgment by the plaintiff, and that no question is raised as to the validity of the first appeal, it is, therefore, on motion, ordered that the second appeal, taken October 20, 1900, be dismissed. It is further ordered, on motion of appellant, that said appellant may complete the record of the first appeal by supplying a properly certified copy of the notice of appeal.

We concur: McFarland, J.; Henshaw, J.

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## SWORTFIGUER v. WHITE et al.*

S. F. No. 2732; August 27, 1901.

66 Pac. 81.

**Appeal—Transcript—Amendment.—Where Plaintiff Took Two Appeals** from the same judgment, and the printed transcript filed contained the second notice of appeal only, on the second appeal being dismissed leave should be granted to appellant to amend the transcript by inserting therein the first notice of appeal.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Esther E. Swortfiguer against Charles G. White and others. From a judgment for defendants, plaintiff appeals. Motion to amend transcript on appeal granted.

Pringle & Pringle for appellant; N. H. Barrows for respondents.

BEATTY, C. J.—The superior court entered a judgment dismissing this action as to all the defendants. From that judgment the plaintiff perfected an appeal. Subsequently to the appeal the superior court attempted to modify its judgment by limiting the dismissal to the defendant White, but, having lost jurisdiction of the cause by reason of the appeal,

*For subsequent opinion, see 137 Cal. 391, 70 Pac. 214; 141 Cal. 576, 75 Pac. 172.

its modified judgment was void. The plaintiff, however, gave notice of an appeal from the modified judgment, and has filed a printed transcript here, which contains only this second notice. On motion of respondent the court in department 2 (ante, p. 778, 66 Pac. 80) has dismissed the second (attempted) appeal, upon the ground that when the notice was given a valid appeal from the only judgment in the case had already been perfected. Pending that motion to dismiss, the appellant moved in bank for leave to amend the transcript on file, by inserting therein her first and valid notice of appeal, thus converting it into a record, upon which she may secure a review of the judgment as originally rendered. The respondents oppose the motion, but only upon grounds too technical to prevail against the consideration that the plaintiff, having a valid appeal and a printed transcript of the record on file, ought not to be deprived of a hearing by the harmless mistake she made in seeking to prosecute the second appeal. The appellant is granted leave to amend the record by adding a copy of the first notice of appeal, with a certificate as to the undertaking given in that connection.

We concur: Temple, J.; McFarland, J.; Van Dyke, J.

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## In re HEALY'S ESTATE.*

Sac. No. 858; September 10, 1901.

66 Pac. 175.

**Administrator—Attorneys Acting for Different Parties.—Code of Civil Procedure,** sections 1597–1599, provides that, when a person who is bound by contract in writing to convey any real estate dies before making the conveyance, the court, after a hearing in which all interested parties may appear, may decree that his executor or administrator convey such realty to the person entitled thereto; and section 1664 declares that in all estates any person claiming to be an heir to the deceased may file a petition in the estate to ascertain and declare the rights of all persons to the estate, in which petition the name of the administrator shall be set forth, and a notice served on him. In the settlement of an estate, a nephew of the deceased

*For subsequent opinion in bank, see 137 Cal. 474, 70 Pac. 455.

claimed the entire estate by virtue of a promise made by the deceased to leave the claimant the property in consideration of certain services. Held, that the administrator was a proper, if not necessary, party, under either theory of the action, and hence the attorneys for the estate could not act as the attorneys for the claimant.

**Administrator—Acquiescence in Conduct of Attorneys.**—Where an administrator knew that his attorneys had been retained by one of the heirs to prosecute a claim for the entire estate under promise of the deceased, and did not intervene in the action, or discharge his attorneys, he will be deemed to have acquiesced in the conduct of his attorneys.

**Administrator—Grounds for Removal.—Civil Code, Section 2230**, declares that neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for whom he acts as agent has an interest adverse to that of his beneficiary, and section 2233 stipulates that, if a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he may at once be removed. Held, that an administrator who acquiesced in the conduct of his attorneys in accepting a retainer by one of the heirs who claimed the entire estate had violated the duties of his trust, and should be removed, the attorneys, as his agents, occupying confidential relations to the heirs.

**Administrator—Removal—Appeal.—Under Code of Civil Procedure**, section 1438, providing that in proceedings for the removal of an administrator the petition and answer must be in writing, a record on appeal is properly authenticated, though the petition, answer and order are not incorporated in the bill of exceptions, where the same were in the record certified to by the clerk.

APPEAL from Superior Court, Lassen County; F. A. Kelley, Judge.

Application by Annie McCabe Thomas for the removal of J. W. Hosselkus as administrator of the estate of Matthew Healy, deceased. From an order denying the petition, the petitioner appeals. Reversed.

A. A. De Ligne and Albert M. Johnson for appellant; Goodwin & Goodwin for respondent.

PER CURIAM.—Deceased died intestate in September, 1897, and J. W. Hosselkus was appointed administrator of the estate, and since has continued such administrator. In September, 1899, Annie McCabe Thomas, one of the heirs,

filed a verified petition, containing allegations upon which she asked to have the letters of the administrator revoked, and some other competent person appointed in his place. The administrator filed his answer, denying specifically all the allegations of fraud and misconduct contained in the petition. The court found all the allegations of the petition to be untrue, and made an order refusing to revoke the letters. This appeal is from the order, upon the record and a bill of exceptions.

The code provides for the revocation of letters of administration upon written allegations and proof showing that the administrator has wasted or mismanaged the estate, or has committed or is about to commit a fraud thereon, or that he is incompetent to act: Code Civ. Proc., secs. 1436–1438. It is claimed that the evidence shows that the administrator is in league with one Ulty McCabe, and by his conduct is committing a fraud upon the estate by aiding and assisting said McCabe as against the other heirs. This claim is based upon the fact that the conduct of the attorneys for the administrator, with his knowledge and consent, is such that from it fraud or willful misconduct should be inferred as against the administrator. The administrator throughout the administration has been represented by the law firm of Goodwin & Goodwin. It appears that the said firm, during the progress of the settlement of the estate, has been retained upon a contingent fee by Ulty McCabe, one of the heirs, who claims the entire estate, under a contract, as against the other heirs. It is the settled law in this state that an administrator cannot represent either side of a contest between heirs, devisees or legatees. His duty is to preserve and protect the estate, and distribute it as the court may direct: Roach v. Coffey, 73 Cal. 282, 14 Pac. 840; Goldtree v. Thompson, 83 Cal. 421, 23 Pac. 383. If this were a contest between the heirs as such, and for the purpose of determining the persons upon whom the law casts the estate, the rule in the above cases would apply. But even then it would certainly appear more in accord with professional ethics for the attorneys who represent the administrator to take no part in a contest between the heirs as such. If the administrator should remain neutral in such contest, it would certainly seem that his attorneys should do so. They are allowed a fee by the court, paid out of the entire estate, for the purpose of remunerating them for the skilled services they render to

the administrator in the care and protection of the estate and the litigation that may arise in connection therewith. As the fee is paid by all the heirs out of the estate, it does not seem that the attorneys who have received the fee should during administration, and while really employed by all the heirs, be allowed to take part in litigation between them. As attorneys for the administrator, they are acting for and retained by all the heirs. As attorneys for one heir, they are, in the same estate, acting against the others who are paying them a fee. But in this case the facts show a condition of affairs which make it plain that it is highly improper for the administrator or his attorneys to aid or assist Ulty McCabe. Ulty McCabe is a nephew and one of the heirs of deceased. The deceased, it appears, left surviving him a brother, a sister and several nieces and nephews, children of deceased brothers and sisters. In March, 1899, Ulty McCabe, by his attorneys, Goodwin & Goodwin, who are attorneys for the administrator, filed a complaint, which he verified, setting forth that a contract was made in May, 1881, when he was only fourteen years of age and deceased fifty-three, by which deceased agreed that, if McCabe would leave Ireland and come to California, and live with deceased until his death, deceased would bequeath and devise to him all and singular his estate. It is alleged in the said complaint that plaintiff fully performed the said contract on his part, but that deceased, on the twenty-sixth day of September, 1897, died, without having carried out his part of the contract by making a will, as he had agreed to do. The plaintiff asks that the court may, by its decree, establish the contract between him and the deceased, as alleged in the complaint, and that all the estate may be awarded to him, and that his title thereto be quieted as against defendants. All the heirs of said deceased are made parties to said suit, but not the administrator. The action is in the nature of an action for specific performance, and also in the nature of an action to determine as to who are the heirs entitled to distribution. The complaint asks that the alleged agreement, made by deceased in his lifetime, to convey all the real and personal property of the estate, may be enforced, and that defendants, and each of them, be ordered to execute to plaintiff a good and sufficient deed to the property. It also asks that it may be decreed that plaintiff is entitled to have all the property of the estate distributed to him. If it be treated

as an action to compel a conveyance by virtue of a contract made by deceased in his lifetime, under sections 1597–1599 of the Code of Civil Procedure, then the administrator is a necessary party. If it be treated as a complaint to determine heirship, under Code of Civil Procedure, section 1664, it is necessary that notice of the application shall be served upon all persons interested in the estate to appear and show cause before the court acquires jurisdiction. The administrator must be named in the notice, and the decree to be rendered is conclusive as to the title to all the property of the estate. It would seem, in such case, that the administrator is a proper, if not a necessary party. The complaint by McCabe makes out much such a case as in the contract discussed in Owens v. McNally, 113 Cal. 447, 33 L. R. A. 369, 45 Pac. 710, and the similarity is certainly such as to excite our curiosity. It was said in Owens v. McNally that such a contract might, in certain cases, be binding, and the subject of specific performance. It was held, however, that the contract in that case could not be specifically enforced, for the reason that it was too uncertain as to the services to be rendered. It is carefully alleged in the complaint by McCabe as to what the services were to consist of. It may be that the uncertainty pointed out in Owens v. McNally did not exist in the contract made by deceased with McCabe; at least it is not so in the complaint. Contracts of the kind set up by McCabe are viewed by the courts with suspicion. The lips of deceased are closed by death. The parties who would know of the transaction, if it really occurred, are probably dead. If a party should set up such a contract fraudulently, he could, with the same view, select his witness or witnesses, placing the transaction at such time and place that no one could contradict it. Therefore every presumption is against the truth of such alleged contract, and courts will not uphold them unless the proof is clear and convincing. It is therefore important that, when a claimant appears and asserts such contract, the administrator, if not required to defend and resist the claim, should keep his hands clean as to the matter. He should not be allowed to pay money to aid in proving such contract; neither should he, as administrator of the estate, pay attorneys who are aiding in proving such contract. All the heirs are represented by him. He should protect the estate against all unjust claims. If this is an unjust claim, why should not he protect

the estate against it? If the claim had been for a money demand, verified (as it is) and presented against the estate, and the administrator believed it to be unjust or false, it would have been his duty to reject it. In such case, would his attorneys be allowed to bring suit for the claimant, and the administrator allowed to shield himself by saying that it did not concern him? In this case the same principle applies. The contract set forth might result in taking all the estate from the heirs and giving it to McCabe by reason of the contract, and not by reason of any heirship. The attorneys are to receive from McCabe a contingent fee. They declined to state the amount, or to show their contract with McCabe. It may be that they are to receive an equal portion of the estate in case of recovery. Can they protect the estate while acting as attorneys in a suit in which they are trying to get a portion of it themselves? They, as attorneys for the administrator, have access to all the books and private papers of the estate. It may be that the administrator has, among such private papers, a written contract, made by deceased with McCabe, as to his services, which would entirely disprove the contract set up by McCabe. If so, would the attorneys for the administrator give it to the attorneys for McCabe, and would they introduce it in evidence in McCabe's case against the heirs?

It seems clear to us that the attorneys for the administrator should not be allowed to act as attorneys for McCabe. It might be that an administrator should not be removed because his attorneys, without his knowledge, have been guilty of improper conduct. But he must, in such case, as trustee, act promptly, and remove the attorneys, and secure others, so that the estate cannot suffer. In this case the facts in the record do not show such conduct on the part of the administrator that we can hold him free from censure. Among the assets of the estate there were some seventeen hundred head of cattle, which were appraised, and afterward sold by the administrator to Hall and Long. When the cattle were being delivered under the sale, McCabe claimed that his wife was the owner of thirteen head of them, and was allowed to take the thirteen head from the band without objection from the administrator. The administrator testifies that upon receiving the information that McCabe had taken the thirteen head,

"I did not consider that there was anything to investigate, because, if Ulty McCabe's wife claimed the cattle, I supposed they were hers. . . . . I did not consider it my duty to find out, for, if they belonged to Mrs. McCabe, they did not belong to the Healy estate. . . . . My attorneys advised me I had nothing to do with the controversy between Long and Hall and Ulty McCabe and wife." The administrator knew of the suit brought by McCabe, and that Goodwin & Goodwin were his attorneys. He says in his testimony: "I did not mention the matter to them, as I did not consider it was any of my business. . . . . I had a conversation with W. N. Goodwin, in the course of which I asked him how Ulty was coming out, and he responded, 'All right.' That is all I did. . . . . I took no measure to protect the heirs, or do anything whatever for them in the case. . . . . I remember when the demurrer to the complaint was argued in this court. I was present during the entire hearing. I remember that Mr. Goodwin appeared for Ulty McCabe. . . . . I do not know why Ulty McCabe claims the whole of the estate, and I do not know why the other heirs resist the claim." Although the administrator was notified of the suit by McCabe, he did not ask to intervene in the action, so as to protect the estate from an adverse claim, nor did he notify the other heirs in any way. We think from the above facts it may well be inferred that the administrator has acquiesced in the conduct of his attorneys, and has thus violated the duties of his trust. As administrator for the estate, he is a trustee: Code Civ. Proc., secs. 1581–1583; Bergin v. Haight, 99 Cal. 56, 33 Pac. 760, and cases cited. It is provided in Civil Code, section 2230, that "neither a trustee nor any of his agents may take any part in any transaction, concerning the trust, in which he or anyone for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary." Then follow certain exceptions, of which this case is not one. It is further provided in sections 2232–2234: "No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust without the consent of the latter. If a trustee acquires any interest or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof and may be at once removed. Every violation of the provisions of the preceding sections

of this article is a fraud against the beneficiary of the trust." Section 2239 provides: "A trustee is responsible for the wrongful acts of a cotrustee to which he consented or which, by his negligence, he enabled the latter to commit, but for no others." The attorneys for the administrator, under the above provisions, are his agents, and occupy the same confidential relations to the heirs: Bergin v. Haight, 99 Cal. 56, 33 Pac. 760. Therefore, what the administrator cannot do, his attorneys cannot do. They are his agents, to assist and advise him as to his trust. He could not bring an action against the heirs of the estate for the entire amount thereof, while administering upon it for the heirs. If he cannot, his attorneys cannot. He will not be allowed to do indirectly what he cannot do directly. The case of In re Jones' Estate, 118 Cal. 503, 62 Am. St. Rep. 251, 50 Pac. 766, is cited by respondent in support of the ruling of the court here. In that case no objection had been made to the appearance of the attorney in the court below, and was a minor point, made in the reply brief here for the first time. The point did not arise in a direct proceeding for the removal of the administrator, and the remarks used by the commissioner in the opinion must be treated as obiter dictum. But in that opinion it is said, in speaking of the right of the attorney for the administrator to appear for one of the heirs as against another, "We can conceive of situations where it might be improper." This is one of those situations in which it is improper. Upon the facts appearing in this record it is plainly the duty of the lower court to suspend the powers of the administrator pending further proceedings, and to revoke the letters of administration if the facts should appear as in this proceeding.

Objection is made by respondent that the record is not properly authenticated, for the reason that the petition, citation, answer and order are not incorporated in the bill of exceptions. The code provides that the petition for removal and the answer must be in writing, and upon the issues thus raised the case must be determined: Code Civ. Proc., sec. 1438. The petition, answer and order are in the record certified to by the clerk. This is sufficient: Miller v. Lux, 100 Cal. 613, 35 Pac. 345, 639. The order is reversed.

## NIXON et al. v. RAUER et al.

S. F. No. 1883; September 30, 1901.

66 Pac. 221.

**Sheriffs — Acts of Deputy — Exemplary Damages.**—A sheriff, though liable for injuries done by his deputy, cannot be charged in exemplary damages for misconduct of such deputy as though he had personally committed the acts.[1]

APPEAL from Superior Court, City and County of San Francisco; William R. Daingerfield, Judge.

Action by Thomas C. Nixon and another against J. J. Rauer and others. From a judgment in favor of plaintiffs and an order denying defendant Whelan's motion for a new trial he appeals. Reversed.

Reddy, Campbell & Metson for appellant; Wm. M. Abbott for respondents.

SMITH, C.—The appeal is from a judgment for the plaintiffs against the defendants Rauer and Whelan for the sum of $350 for forcibly breaking and entering the plaintiffs' dwelling-house, and for carrying away goods of the plaintiffs, and from an order denying the defendant Whelan's motion for a new trial. The case was tried by a jury, who rendered a verdict for the amount named. The defendant Whelan alone appeals.

The appellant at the time of the trespass was sheriff of the city and county. He did not personally participate in the trespass—which was committed by one of his deputies in levying an attachment—but is charged solely on account of his official relation to the actual trespasser. On the trial the jury was instructed, among other things, in effect, that the sheriff, be-

[1] Cited and followed in Foley v. Martin, 142 Cal. 261, 263, 100 Am. St. Rep. 123, 75 Pac. 842, where it is held that ratification by the principal officer is necessary in order that he be made responsible in punitive damages.

Cited with approval in Davis v. Hearst, 160 Cal. 165, 116 Pac. 540, a libel case, where the principle is applied to the responsibility of a newspaper proprietor for the act of his subordinate.

ing answerable for the acts of his deputy, might be held liable in exemplary or punitive damages for the aggravated misconduct of his deputy, as though he had personally committed the acts. This was erroneous. "Exemplary or punitive damages, being awarded not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though, of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of the agent": Railroad Co. v. Prentice, 147 U. S. 107, 37 L. Ed. 97, 13 Sup. Ct. Rep. 261; Warner v. Railroad Co., 113 Cal. 105, 54 Am. St. Rep. 327, 45 Pac. 187; Trabing v. Improvement Co., 121 Cal. 143, 40 L. R. A. 585, 53 Pac. 644. I advise that the judgment and order appealed from be reversed.

We concur: Gray, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

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## MALTER v. CUTTING FRUIT PACKING COMPANY.

S. F. No. 1877; October 29, 1901.

66 Pac. 582.

**Sale—Contract to Buy Crop of Raisins—Construction.**—The parties executed an agreement by which defendant agreed to buy plaintiff's "partial crop as they may select crop of raisins from vineyard . . . . M. (product of 1897), to be delivered in sweat-boxes at buyer's packing-house in good, merchantable condition, on the following terms: . . . . Muscat and Malaga delivery not later than October 15, 1897. Price per pound, 2½c.; [defendant] to pick and cure and put in sweat-boxes. Muscats to be graded from trays and sweat-boxes into two grades . . . . 'London Layers' and 'Loose Muscatels.'" Held, that as under this contract the grapes were to be picked and cured by defendant, and such as were of merchantable quality then

became his property, and he was to put them in sweat-boxes, and plaintiff could not deliver them until this was done, and the grading from trays and sweat-boxes was the work of defendant, who could not defeat the contract by neglecting or refusing to perform such acts, plaintiff, in an action for the contract price, was not bound to allege the performance of the acts necessary by the defendant, and a complaint alleging that defendant had picked and dried a certain amount, a part of which plaintiff had delivered, and the balance of which he was ready to deliver, and that a certain amount of the contract price remained unpaid, was sufficient.

**Sale—Contract to Buy Crop of Raisins—Action for Price.**—Plaintiff brought an action for the price of raisins sold under a contract by which the defendant was to select and cure the raisins and place them in sweat-boxes, in which they were to be delivered by the defendant. There was evidence that defendant picked a certain amount of grapes, a certain portion of which was hauled by plaintiff's teamsters and delivered by them, after which defendant refused to allow any more to be hauled; that the price had gone down, and defendant claimed that he could not handle any more at the contract price; that the balance of the raisins was on trays or in boxes; that from half to two-thirds of those undelivered were of as good quality as those delivered; that subsequently they were damaged or their value destroyed by rains. Held, that the evidence was sufficient to sustain a verdict for the plaintiff.

**Sale.—In an Action for the Contract Price of Raisins,** a part of which the defendant had refused to receive, it was not error to refuse to permit a question to be asked plaintiff's witness on cross-examination, as to whether there had not been some complaint about the condition of the raisins, as the question was not confined to complaints by persons connected with the transaction. The error, if any, in refusing such question, was rendered harmless by allowing the witness, in reply to subsequent questions, to fully explain the condition of the raisins.

**Sale.—In an Action for the Contract Price of Raisins** which defendant had picked and cured in plaintiff's vineyard, and a part of which he subsequently refused to receive, alleging that they were damaged by rain, the error in allowing plaintiff to give evidence as to whether defendant did anything to prevent the raisins from being damaged, there being no issue as to defendant's negligence, was not prejudicial, as plaintiff claimed to recover only for such raisins as were merchantable, and the court instructed that his recovery must be so limited.

**Sale.—In an Action for the Contract Price of Raisins** which defendant had picked and cured in plaintiff's vineyard, but the delivery of part of which he subsequently refused on the ground that they had been damaged by rains, this part having been used by plaintiff in his winery, the introduction of evidence by him that they

were of no value at the time they were so used, though such evidence was immaterial, was harmless error, in view of the fact that defendant had abandoned such portion before their use, and that plaintiff only claimed to recover for such as were of good, merchantable quality.

**Sale.—Where, in an Action for the Contract Price of Fruit** sold, defendant wished to show that a certain payment was made to M., as a step toward proving her to be the plaintiff's agent, and such evidence was refused, but the witness testified as to what M. did and said in the course of employment, the error in rejecting the evidence was not reversible.

APPEAL from Superior Court, Fresno County; E. W. Risley, Judge.

Action by G. H. Malter against the Cutting Fruit Packing Company. Judgment for plaintiff, and from an order denying a motion for a new trial defendant appeals. Affirmed.

L. L. Cory for appellant; George E. Church for respondent.

CHIPMAN, C.—Action on contract for sale and purchase of certain raisins. The cause was tried by a jury, and plaintiff had the verdict. Defendant appeals from the order denying its motion for a new trial. Defendant interposed a general demurrer to the complaint, which was overruled, and it objected to any evidence in support of the complaint, on the ground that it failed to state a cause of action, and on the further ground that the contract is too uncertain and ambiguous to found an action thereon, and that it does not appear what crop, if any, was to be sold, nor is there any allegation in the complaint from which that fact can be determined. The objection was overruled and exception reserved.

It is alleged in the complaint that the parties executed the following agreement on the day of its date:

"Fresno, Cal., September 15, 1897.

"G. H. Malter agrees to sell and Cutting Fruit Packing Company agrees to buy seller's partial crop as they may select crop of raisins from vineyard known and described as follows: . . . . acres, Malcolmson, Youngberg, and Posen (product of 1897), to be delivered in sweat-boxes at buyer's packing-house in Fresno in good, merchantable condition, on the

following terms and conditions: Muscat and Malaga delivery not later than October 15, 1897. Price per pound, 2½c.; the Cutting Fruit Packing Co. to pick and cure and put in sweat-boxes. Muscats to be graded from trays and sweat-boxes into two grades, commonly known as 'London Layers' and 'Loose Muscatels.' Terms one-half cash when picked, interest ten per cent. per annum on advances, balance on delivery.

"(Signed) G. H. MALTER.
"(Signed) CUTTING FRUIT PACKING CO.,
"Per F. B. WILSON."

That under said agreement defendant entered upon the vineyard specified in the contract as the Malcolmson vineyard, and did pick and dry 43 909/2000 tons of raisins, and by virtue of said agreement there became due plaintiff the sum of $2,174.08. It is alleged that plaintiff "has fully performed all the terms and conditions of said agreement to be by him kept and performed," and that plaintiff delivered to defendant at its packing-house at Fresno 38 tons and 917 pounds of raisins so picked and dried by defendant, and offered to deliver and tendered to defendant at its said packing-house the balance of said raisins, to wit, 16 tons and 616 pounds, "and this plaintiff has been and was at all times ready and willing to deliver the same, and to keep and perform the said agreement on its [his] part to be kept and performed, and this plaintiff requested and demanded of said defendant that it perform and carry out said contract according to its terms, and that it receive said raisins and pay to this plaintiff the said sums so agreed to be paid, . . . . but that said defendant has failed and refused, and still fails and refuses, to keep and perform the terms . . . . of said agreement, . . . . and has failed and refused, and still fails and refuses, to comply with said request, . . . . save and except the said amount, . . . . and still fails and refuses to pay said sum, or any part thereof, . . . . except the sum of $850"; "that, by reason of the failure and refusal of said defendant to perform its said contract, . . . . plaintiff has been damaged," etc.

It is not easy to determine just what the contract means. The parties, however, understood it to have some meaning, and proceeded to act under it. It is our duty to give it some

meaning, if we can reasonably do so. Respondent contends that the sale was of grapes on the vines, the defendant to have the right to select and pick such as it might regard suitable for its purpose; that the title to the property vested in defendant when it selected, picked and took charge of the grapes (i. e., as we understand respondent, the selection was to be made on the vines, and not on the trays or in the sweat-boxes); that plaintiff had nothing to do but haul the raisins to the packing-house at Fresno. Appellant contends that on its refusal to receive the raisins the property belonged to plaintiff, and he cannot retain the raisins and recover the full contract price; that defendant was to purchase such raisins as it should select from plaintiff's crop; that they were to be in good, merchantable condition, and to be delivered not later than October 15, 1897; that it nowhere appears in the complaint that defendant has selected any raisins from plaintiff's crop, or that they were merchantable, or that they were delivered before October 15th, and that all these facts must appear before any liability attaches to defendant, and hence the complaint is insufficient. Defendant did not contract to pay two and one-half cents per pound for grapes on the vines, but the agreement was to pay for raisins, which means grapes cured in the form of raisins. The contract does not state who was to haul the raisins to Fresno, but, looking at the entire contract, as we must, for a just interpretation of it, we think the hauling was to be done by plaintiff; and plaintiff so construes the contract, as appears from the complaint. The grapes were to be picked and cured by defendant and put in sweat-boxes by defendant, and what were grapes when picked became raisins when dried; and in this condition plaintiff was to haul them to, or, as the contract says, deliver them at, Fresno. But they were also to be "in good, merchantable condition" (i. e., they were to be of good, merchantable quality). It being the duty of defendant to put the raisins in sweat-boxes, plaintiff could not deliver them, and was not called on to deliver them, until this was done, or unless defendant permitted them to be delivered in some other receptacle. On the other hand, when sufficiently cured on the trays to go into the sweat-boxes such of the raisins as were "in merchantable condition," or of merchantable quality, should be regarded as defendant's property for which defendant would be liable, if defendant refused to al-

low plaintiff to haul them to Fresno. The grading from trays and sweat-boxes into two grades—London layers and loose Muscatels—was the work of defendant, but did not affect the price to be paid, or defendant's duty to pay for them. Defendant could not defeat the contract by neglecting or refusing to put the raisins in sweat-boxes, nor by neglecting or refusing to do the grading. In the phrase "agrees to buy seller's partial crop as they may select crop of raisins from vineyard," etc., the word "select" does not mean that defendant was to select raisins after they were in the sweat-box, and that prior to this time the raisins belonged to plaintiff, but it means that defendant was to select grapes in the vineyard (i. e., could pick and cure such grapes and convert them into raisins as it wished to), and it had the entire vineyard to select from. The raisins for which it was liable were such as were in merchantable condition, either on the trays or in the sweat-boxes. The complaint alleges that defendant entered upon the vineyard of plaintiff and picked and dried (and "dried" must be taken as used in the sense of "cured") 43 909/2000 tons of raisins, and by virtue of the agreement there became due therefor $2,174.08; that plaintiff delivered to defendant at Fresno 38 tons and 917 pounds so picked and dried by defendant, and offered to deliver the balance, etc. As we construe the contract, it was not necessary for plaintiff to allege the acts which it was defendant's duty to perform. It was sufficient to allege readiness and an offer to do what he agreed to do, which was to haul and deliver such of the raisins as defendant placed in sweat-boxes and permitted him to haul and deliver, and it is alleged that he did haul and deliver a large portion of the raisins. Plaintiff is not seeking to recover for goods which he retains. So far as the complaint shows, the raisins are still in defendant's possession. We think the complaint sufficient as against a general demurrer. The answer denied specifically the material allegations of the complaint. For further answer it was alleged that plaintiff offered to deliver certain damaged raisins after October 15th, being the raisins mentioned in the complaint as delivered, and that defendant refused to accept them under the contract, but agreed to receive them at the price of one and one-half cents per pound, to be applied toward an advance of $850 made to plaintiff by defendant, and that the raisins were received under this latter agree-

ment; denies that plaintiff ever offered to deliver raisins of a merchantable quality; that, as to the raisins not delivered, plaintiff agreed to retain them, and did retain them, to his own use.

2. It is claimed by appellant that the evidence does not support the verdict. There is evidence that defendant hauled trays to the vineyard September 20th, and commenced picking grapes on the 21st. One Dunlap had charge of the work for defendant, and delivered the raisins to plaintiff's teamsters to be hauled to Fresno. Receipts were given to the teamsters, and brought back and given to one McGee, foreman of plaintiff. These receipts were put in evidence, but do not appear in the record. We must assume that they showed the quantity delivered to be that claimed in the complaint. When the last load was delivered, there is evidence that defendant refused to allow any more to be hauled; that the price had gone down, and defendant claimed it could not handle any more at the contract price. Defendant claims that the raisins delivered were to be paid for at $30 per ton, and that the parties so agreed. But this is denied, and the evidence of plaintiff was that no such agreement was made. At this time the balance of the raisins was on trays or in boxes. They had been rained on, and there is some evidence that the trays were not stacked when they should have been to protect them from storms. There is evidence that from half to two-thirds of the sixteen tons, then undelivered, were merchantable and as good as the raisins that were received by defendant, but that defendant refused to put them in sweat-boxes or allow plaintiff to haul them to Fresno to defendant. This was in November. The raisins were finally put in boxes by defendant, and remained in that condition until the following March, when they were unfit for any use as raisins, and were meanwhile apparently abandoned by defendant. The evidence is that they had no market value. Plaintiff hauled them to his winery in March, where he used them, but whether they had any money value for that purpose was not shown by either party. The jury assessed the damage to plaintiff at $1,322.72, but the court reduced the amount to $1,299.27, to which plaintiff assented, and judgment was given for that amount. As we interpret the contract, there was evidence sufficient to justify the verdict.

3. Certain errors of law alleged to have been committed at the trial remain to be noticed. The witness McGee, foreman of plaintiff, was asked on cross-examination the following question: "There had been some complaint about the condition of those raisins, hadn't there?" It was not error to refuse the question because it was not confined to complaints made by any person connected with the transaction, and, if error, it did no harm, because the witness was next asked the condition of the raisins, which he fully explained.

4. This witness was asked by plaintiff what defendant did to protect the raisins from being rained on. Defendant objected as irrelevant, but the question was allowed. No issue of defendant's negligence was raised by the pleadings, and no evidence was admissible by either party to show negligence. It appears, however, that plaintiff claimed only for such raisins as were merchantable and in condition to be delivered; and the court instructed the jury, at defendant's request, that plaintiff could recover only for such raisins as were good, merchantable raisins at the time of delivery, or at the time plaintiff offered to deliver and defendant refused to accept. We cannot see that the evidence was prejudicial.

5. Plaintiff was permitted to testify that the rejected raisins had no value, and it is now claimed as error, because no time was fixed at which such value was testified to. I think it sufficiently appears that the witness was speaking of the time they were hauled to the winery. As defendant made no claim by way of offset or otherwise for the raisins used in the winery, the evidence had no significance and was immaterial. But as the property was abandoned by defendant, and as it makes no claim that it had any value in its condition when plaintiff took it to his winery, and as plaintiff only claims for such raisins as were good, merchantable fruit when defendant refused to allow him to haul and deliver it at Fresno, the evidence would seem to be harmless.

6. On examination of witness Langley, defendant's agent, defendant asked the question: "To whom was the payment of $850 actually made—to Mr. Malter personally, or someone for him?" Plaintiff objected, and his counsel stated: "It is admitted it is paid. We are not denying it is paid." Defendant's counsel stated that the object was to show that the money was paid to Miss Phillips, and that this was one step toward showing that she was the agent of plaintiff, and was

authorized to make the agreement to which Langley had testified, namely, that the raisins delivered were to be paid for at the rate of $30 per ton. Langley had already testified to what Miss Phillips had said and done, and that she was acting as plaintiff's manager. It appears from the evidence of the witness that he was permitted to and did testify to what Miss Phillips said and did in the course of her employment. The question was admissible under the issue raised by defendant for the purpose claimed, but the one fact excluded was too inconsequential to justify reversal. Besides, defendant should have asked the direct question, after stating its purpose, whether the $850 was not paid to her. Had this been done, the court might have admitted it.

7. Defendant asked certain instructions which were refused, and this is assigned as error. In effect, the instructions were that defendant had the right to select the raisins after it had picked and cured them and put them in the sweat-boxes; that defendant, in short, could reject raisins after it had cured them and put them in sweat-boxes ready for delivery. The contract, in our opinion, does not warrant such interpretation. Defendant had the entire handling, from vine to sweat-box, and the instructions imply that defendant might reject them, no matter from what cause the raisins became nonmerchantable after being put in the sweat-boxes. The other instructions given were as favorable to defendant as could be asked, and were, in the main, requested by defendant. The nonsuit asked at the close of plaintiff's evidence was rightly refused, and the evidence is sufficient to justify the verdict.

It is advised that the order be affirmed.

We concur: Cooper, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

## STROUSE et al. v. SYLVESTER et al.

S. F. No. 1834; November 8, 1901.

66 Pac. 660.

**New Trial.—On Appeal from an Order Denying a Motion** for a new trial, where the judgment rendered is not appealed from, the sufficiency of findings to support such judgment will not be considered.

**New Trial.—On an Appeal from an Order Denying a Motion** for a new trial, conclusions of law are not reviewable.

**Corporation—Salaries of Directors—Fraud.—The By-laws of a Mining Corporation** authorized the directors to fix salaries. H., a stockholder, contracted with two others for a transfer of their stock to him for four years, without power of sale. Having thus become a majority stockholder, he presented to his brother, A., and to personal friends, M. and C., five shares, each, of his own stock. M. was in the personal employ of H. At the stockholders' meeting shortly ensuing, H., A. and M. were elected directors, and the board was organized by the election of H. as president, M. as secretary and treasurer, and A. as vice-president. Later another director was removed, and C. chosen in his place. On motion of A., seconded by M., H. was given a salary of $250 per month as president, and on motion of C., M. was given a like amount. The minutes showed that both motions were carried unanimously, but later interlineations showed that H. did not vote in the first instance nor M. in the second. H. paid assessment No. 4 by offsetting his salary as president, and purchased delinquent stock in the same manner. He borrowed M.'s salary from him, giving a note, without interest, payable when the mine became productive. On inquiry by S., an innocent director, as to the payment of assessment No. 4, H. said: "The cat is out of the bag. I suppose S. will be mad, but I had to do it. It cost a good deal to get control of the mine, and I am king of the situation. Crack your whip." Held, that the evidence was sufficient to show that the salaries voted H. and M. were a fraud on the corporation, and that their use by H. as offsets to his liabilities was ineffectual as payment. Assessment No. 5 was void as being made in bad faith and as violating Civil Code, section 333, which provides that no assessment must be levied while any portion of a previous one remains unpaid, unless the power of the corporation has been used for its collection, since the offsetting of the fraudulent salaries against assessment No. 4 could not constitute payment as required by the statute.[1]

[1] Cited with approval by the court in Booth v. Summit Coal Co., 55 Wash. 174, 19 Ann. Cas. 1255, 104 Pac. 210, where for a raise of salary, procured by a trustee of a corporation, among other alleged fraudulent practices, it was held that a stockholder was entitled to an accounting and the appointment of a receiver.

APPEAL from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Mark Strouse and others against Henry Sylvester and others. Mark Strouse having died after judgment in favor of plaintiffs, his executrix was substituted as plaintiff. From an order denying a new trial defendants appeal. Affirmed.

C. W. Cross for appellants; Deal, Tauszky & Wells for respondents.

HAYNES, C.—This action was brought by Mark Strouse, a director, and twelve others, stockholders in the Gold Ridge Consolidated Mining and Milling Company, against said corporation and Henry Sylvester, Albert J. Sylvester, William F. McLaughlin and Ira H. Chapman, who, with plaintiff Strouse, constituted the board of directors of said corporation. Said Mark Strouse having died, after judgment his executrix was substituted as plaintiff. A demand was duly made upon the board of directors to bring the action, and, the board having refused to do so, the action is prosecuted by the plaintiffs for the benefit of the corporation. No question is made as to their right to do so. The plaintiffs had findings and judgment, and defendants appeal from an order denying their motion for a new trial.

No question is made as to the rulings of the court during the progress of the trial. There is no appeal from the judgment, and hence the sufficiency of the findings to support it cannot be considered. Some question is made by appellant as to the conclusions of law, but upon an appeal from an order denying a new trial the conclusions of law are not reviewable: Bode v. Lee, 102 Cal. 586, 36 Pac. 936; Owens v. Water Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253. The only question, therefore, is as to the sufficiency of the evidence to justify the findings. The Gold Ridge Consolidated Mining Company was incorporated and organized in January, 1894. Its capital stock consisted of 100,000 shares, of the par value of $100 each. It owned several mining claims in Nevada county, in this state, which then, and at the time this case was tried in the court below, were only partially developed, and were wholly unproductive. With the excep-

tion of 15,000 shares of treasury stock, sold at ten cents per share, it had no resources wherewith to meet its obligations other than assessments upon its capital stock. Prior to 1896 neither of the directors named as defendants in this action had served as directors of said corporation. In 1896 the regular time for holding the stockholders' meeting for the election of directors was May 14th. On May 4, 1896, the defendant Henry Sylvester owned 17,073 shares of said stock, one Phelan owned 19,000 shares, and one Lillie owned 15,205 shares, and on that day these three stockholders entered into a contract by which Phelan and Lillie were to transfer their said stock to said Henry Sylvester, he to vote and control the same for all purposes for the term of four years, but without the power of sale. These shares aggregated 51,278, a majority of the whole, and gave him the power to control absolutely, for that time, all elections of directors. On May 12th, Phelan and Lillie surrendered their stock to Sylvester, and a new certificate was issued to him therefor, and on that day he caused to be issued of his own stock five shares to each of the defendants McLaughlin, A. J. Sylvester and Ira H. Chapman. Prior to this neither of the three owned any stock in said corporation, nor has either of them since acquired any other shares therein. The annual meeting for the election of directors was to have been held the second day after said shares were issued to said last-named defendants, but it was postponed until June 4th, and was held on that day, and resulted in the election of Mark Strouse (one of the plaintiffs) and B. F. Ricker, members of the preceding board, and the defendants Henry Sylvester, his brother, A. J. Sylvester, and W. F. McLaughlin, and on the same day the board organized by the election of Henry Sylvester as president, McLaughlin as secretary and treasurer, and A. J. Sylvester vice-president. On August 4th, at a meeting of the board, on the motion of A. J. Sylvester, Ricker was removed from the board on the ground that no shares were standing in his name on the books, and Ira H. Chapman was elected in his place, and, being present, immediately took his seat. At the same meeting, on motion of A. J. Sylvester, seconded by McLaughlin, it was ordered that the president receive a salary of $250 per month, beginning from that date, and on motion by Chapman it was ordered that McLaughlin receive

from that date a salary of $250 per month, the minutes showing that both motions were carried unanimously. At a later date, as shown by the testimony of Mr. Nichol, the words, in the first case, "Dr. H. Sylvester not voting," and in the second case, "Wm. F. McLaughlin not voting," were interlined. Prior to these proceedings an assessment (No. 4) became delinquent, and after one or more postponements the sale of delinquent stock took place September 30, 1896, and Henry Sylvester bid the amount of the assessment and costs on 21,310 shares thereof (amounting to $549.75) therefor, and the same were struck off to him. The amount of the assessment upon his own stock (17,073 shares), amounting to $426.82, he claimed to have paid. The complaint charged that he made it falsely to appear from the books that he paid the assessment upon his own shares, and that he also paid the amount of his bid for the said 21,310 shares; and the court found that he did not pay the assessment upon his own stock, nor his bid upon the 21,310 shares, nor any part of either. It was further found by the court, in substance, that the five shares transferred by Henry Sylvester severally to McLaughlin, Chapman and A. J. Sylvester was a gift to them for the purpose of qualifying them to become directors; that McLaughlin was in the employment of Henry Sylvester on a salary and certain commissions on business brought by him to Henry Sylvester in his profession, both being dentists; that Chapman, also a dentist, was a friend and a former student in his office, and A. J. Sylvester was his brother; that the salary voted for the president and for the secretary and treasurer of $250 per month to each was for the purpose of defrauding the corporation and the other stockholders; that in the adoption of these resolutions giving the president and secretary each a salary both participated, and that they were not passed in good faith and for the benefit of the corporation; that the resolution giving the secretary and treasurer a salary of $250 per month was not passed for his benefit, but for the benefit of the president, giving him, in effect, $500 per month.

We think the evidence sustains these findings. McLaughlin testified that he received $500 out of the treasury; that he took it himself out of what came in; that he took $250 on two different occasions; that he did not remember what

he did with this $500; that he gave no part of it to the president that he remembered; that he received this $500 in gold and silver; that the money he took to pay himself came from the assessment (No. 4); that he thought there was no money on hand before the sale, which took place September 30th. A little later he testified that he drew $250 on September 28th, and $250 on October 2d, and that he could not tell what became of the money, and that the president drew $250 at the same time he did. McLaughlin further testified that the assessment upon Dr. Sylvester's stock was not paid in cash; that it was offset against the salary of the president and secretary, and that the first $250 of his salary went toward paying assessment No. 4 on the president's stock; that he lent it to him for that purpose, and that Sylvester gave his note for it, to be paid, without interest, when the mine is sold or is paying; that that $250 was not paid to him in cash; that he was supposed to have drawn it—that is, on the books the company was charged with the salaries of the president and secretary and credited with the amount of the assessment upon the president's stock and the amount bid by him for the 21,310 shares which were struck off to him at the sale of delinquent stock, amounting together to $976.57½. No money passed in this transaction. Sylvester had the benefit of the whole salary of himself and the secretary for two months, amounting to $1,000, while all the secretary had to show for his half was a note, without interest, for $250, to be paid when the mines should be sold or prove profitable. On October 20th, another assessment was ordered. Some time between that date and November 12th, Mr. Nichol, the bookkeeper for Mr. Strouse, called on the president to obtain the result of assessment No. 4, and the expense account of the company, and was informed that at the sale of delinquent stock on September 30th 3,529 shares were bid in for the company; that the assessment produced in money $1,398.24, including the assessment upon his stock and the amount bid on the 21,310 shares bought by him at the sale; and the net result was that, after paying the salaries of the president and secretary for two months ending four days after the sale, there was a balance of $398.24 to meet contingent expenses and develop the mines. The testimony shows that but two men were employed at the mines, while the corporation was pay-

ing salaries to its president and secretary at the rate of $6,000 per annum. It is inconceivable that Sylvester, who owned nearly one-fifth of the stock, would consent to the payment of a salary of $3,000 a year to an inexperienced secretary, especially when he was already paying him a salary for his services in his dental office. The evidence is quite sufficient to show that these three directors, McLaughlin, Chapman and A. J. Sylvester, who had no interest in the corporation until two days before the time fixed for the election of directors, and who were made directors by Henry Sylvester, who had just acquired the right to vote a majority of the stock, were wholly subservient to him, and were made directors to promote his interests; that these salaries were voted to enable him to pay the assessment on his own stock and to purchase other delinquent stock at the expense of the corporation, and thus enable him to acquire, by repeated assessments, such delinquent stock as might from time to time be sold; and under such management it is highly probable that increasing quantities of stock would be sold under successive assessments, and what Sylvester could not purchase would go into the treasury, where it could not vote. At the time of Mr. Nichol's visit, above mentioned, he first learned of the salaries having been voted, and objected to it, and Sylvester replied: "Well, the cat is out of the bag. I suppose Strouse will be mad, but I had to do it; that it had cost him a good deal to get control of the mine, and he was king of the situation. Crack your whip." We think the evidence fully justifies the finding that the resolutions giving these salaries were fraudulent, and made for the benefit and profit of Henry Sylvester by means of a subservient board selected and elected by him; and, while there is evidence tending to show that he did not vote for the resolution giving him a salary, it was procured by him through his control of the other members of the board. The fact that the by-laws authorized the board to fix the salaries of the officers does not cleanse the transaction.

As to assessment No. 5, levied on October 20th, the court found that it was not levied in good faith, and that it was levied while assessment No. 4 on the 17,073 shares owned by Sylvester, and on the 21,310 shares bid in by him, remained unpaid. The evidence tending to show the want of

good faith has been sufficiently noticed. As to the second ground of invalidity, section 333 of the Civil Code provides that "no assessment must be levied while any portion of a previous one remains unpaid," unless the power of the corporation has been exercised for its collection. If Sylvester had paid in cash his assessment and the amount of his bid for the shares struck off to him, there would have been in the treasury $976.57½ more than was received from assessment No. 4, and it does not appear that in such case there would have been any necessity for assessment No. 5. If, as the court found, the resolutions allowing the salaries were a fraud upon the corporation, Sylvester had no right to offset such salaries against the assessment of his stock, or his bid upon other stock struck off to him, and as between him and the corporation his assessment and bid were unpaid.

I advise that the order appealed from be affirmed.

We concur: Gray, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

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## NIELSEN v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.*

S. F. No. 1915; November 8, 1901.

66 Pac. 663.

**Life Insurance—Waiver of Forfeiture.—A Life Insurance Policy Provided for an Annual Renewal,** without medical re-examination, upon payment of a certain premium on a certain day, and that failure to pay such premium on the day specified should terminate the policy; but it was the custom of the company to reinstate policies upon the insured's paying the premium and furnishing a health certificate within thirty days from such lapse. The insured failed to pay the third annual premium, but within thirty days sent a money order

*For subsequent opinion in bank, see 139 Cal. 332, 96 Am. St. Rep. 146, 73 Pac. 168.

to the company, but without the health certificate. Notices of this premium had been accompanied by a blank health certificate, and requests for its execution in connection with the remittance. The company receipted for the money order, expressly stating that they could not accept it as payment unless the health certificates were sent within thirty days. Insured died without sending the certificate, and the money order was returned. Held, that, the policy having lapsed and the health certificate being a prerequisite to its reinstatement, the evidence was not sufficient to show a waiver of the forfeiture on the part of the company.

**Life Insurance—Notice That Premium is Due.—A Notice, in Writing,** stating the number of the policy, amount of premium, place at which and person to whom it was payable, and which was inclosed in a securely closed envelope, addressed to the insured at his residence in California, and deposited, postage prepaid, in the postoffice in New York, thirty days prior to the day on which the premium fell due, was a sufficient notice, under the laws of New York, requiring notice of insurance premiums to be given at least fifteen, and not more than forty-five, days before such premiums become due.

**Life Insurance—Nonpayment of Premium—Application of Reserve.**—Under the New York statute, providing that, when an insurance policy has lapsed for nonpayment of premiums, the net reserve on such policy shall, on demand made, with surrender of the policy within six months after such lapse, be taken as a single premium, etc., and shall be applied "as shall have been agreed in the application and policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, or to purchase upon the same life" paid-up insurance, a policy on which two annual premiums have been paid, providing that its reserve fund shall be "used toward offsetting any increase in the premiums" on such policy, is not self-perpetuating after nonpayment of premiums, although its reserve fund is more than sufficient to buy temporary insurance up to the death of the insured, since the statute requires an election to be made by the insured, and the policy makes no provision for the application of such reserve to continued insurance.

**Life Insurance—Reserve.—An Instruction Submitting to the Jury,** as a question of fact, the inquiry whether "there was a reserve on the policy" of a certain amount "calculated as provided in said statute," the substance of the statute having been given them, was error, since it is not within the province of the jury to determine a question depending upon purely mathematical calculation and the construction of a statute.

APPEAL from Superior Court, City and County of San Francisco; George H. Bahrs, Judge.

Action by Mathilda Nielsen against the Provident Savings Life Assurance Society of New York. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Lloyd & Wood for appellant; Van Ness & Redman for respondent.

COOPER, C.—Action to recover $2,500 upon a policy of life insurance. The case was tried with a jury, and verdict rendered for plaintiff for the amount claimed. Judgment was accordingly entered, and from the judgment and order denying a new trial the defendant appeals.

On January 21, 1893, the defendant, in consideration of a premium of $43.70, issued its policy of insurance by which it promised to pay Mathilda Nielsen, wife of John Nielsen, $2,500 within sixty days after proof of the death of John Nielsen, provided such death should occur on or before the twenty-first day of January, 1894. The policy contained the following clauses and conditions: "And the said society further agrees to renew and extend this insurance upon like conditions, without medical re-examination, during each successive year of the life of the insured from date hereof, upon the payment, on or before the twenty-first day of January in each such year, of the renewal premiums, in accordance with the schedule rates, less the dividends awarded hereon." "Failure to pay any premium or semi-annual or quarterly installment thereof when due will thereupon terminate this policy." "After deducting the expense charge, which is limited to four dollars per annum on each thousand dollars insured, the society agrees to divide the residue of each renewal premium received by it upon this policy as follows: Such amount as shall be required for this policy's share of death losses will be appropriated as a death fund, to be used solely in settlement of death claims. The remainder thereof will be retained as a guaranty fund. The amounts so retained on account of this policy will be used towards offsetting any increase in the premium on this policy from year to year; or, provided this policy, after five full years' premiums have been paid, be terminated solely by nonpayment of any stipulated premium when due, eighty per cent of any amount so retained, but not so used, will be applied to extend this insurance, or, if application be made

therefor while this policy is in full force and effect, to purchase paid-up insurance." The policy was continued in force by the payment of the premiums when due until January 21, 1896, at which time the premium, although due, was not paid. John Nielsen died February 19, 1896. The complaint contains three counts upon which plaintiff relies. In the first, the payment of the premiums in due time, and the full performance of the contract on the part of deceased during his lifetime, are alleged; in the second, the failure of the defendant to give the notice required by the laws of New York of the time when the premium would be due; in the third, that the policy carried a reserve in amount sufficient to protect it from forfeiture between the date when the premiums became due and the death of Nielsen.

We do not think there is sufficient evidence to sustain the verdict as to either count. As to the first, it is not claimed, and there is no evidence tending to show, that the premium was paid on or before the twenty-first day of January, 1896. It is therefore evident that the policy became void after January 21, 1896, unless it is shown that defendant waived the payment by accepting the premium, or in some other manner, and it is claimed that such waiver is shown by the evidence. It appears that it was the custom or rule of this company—as in fact it is of most insurance companies—to reinstate the insured within thirty days after the policy has become forfeited upon application of the insured, payment of the premium, and a health certificate properly signed as required by the rules of the company. On January 25, 1896, the manager of defendant wrote to deceased, informing him that his premium, $22.73, was due January 21st, and asking him to remit the amount, with the health certificate properly signed. In this letter deceased was urged to remit the amount at once and sign and return the health certificate, a copy of which was inclosed in the letter. In answer to the above letter, deceased wrote on January 27th acknowledging the receipt, and stating that he would remit the amount in a few days. On February 4th, plaintiff wrote to defendant asking about the payment of the premium, stating that she wanted to attend to it if her husband had not done so, as he was very careless. This letter was promptly answered by defendant's manager February 5th, in which the amount of the premium was stated, $22.73, that it was due January 21st,

and had not been paid. In this letter the following language was used:

"According to the conditions of the contract, he has thirty days after due date in which to pay, provided he can sign a health certificate, a blank of which we inclose. In remitting the premium, kindly return this health certificate, signed by your husband, and having it witnessed.

"Yours, very truly,

"G. C. PRATT, Manager.

"Send postoffice order."

Not having received the premium nor the health certificate, the defendant's manager again wrote to plaintiff on February 14th, and in this letter said: "The premium on your husband's policy, No. 50,386, of $22.73, was due January 21st, and has not been paid, and if not paid before the 21st inst. we cannot receive it. We have already sent you health certificate, and trust you will give this your immediate attention." On February 17th deceased sent a Wells-Fargo money order for $22.75, inclosed in a letter, but did not send the health certificate. The manager of defendant thereupon, on February 18th, again wrote to deceased, acknowledging the receipt of the money order, and in the letter said: "Before we can send you the regular receipt, it will be necessary for you to sign and return the inclosed health certificate, having it witnessed. Where a premium is overdue, the company always requires this blank to be filled out before the premium can be accepted." In this letter another blank health certificate was inclosed. To this letter no reply was received and no health certificate ever sent to defendant. On February 19th John Nielsen died, and after hearing of his death the $22.75 was returned. At the time he died the money order had not been cashed, nor had it been at the time of the trial.

We do not think the above evidence sufficient to show any waiver by defendant. It had stated over and over again the conditions upon which the insured could be reinstated. The premium must have been paid and a health certificate sent to defendant within the thirty days. The deceased had been notified before the premium was due and had failed to pay. The policy was thereupon, according to its terms, dead, but defendant allowed the usual thirty days' grace, and urged deceased to avail himself of it by complying with the rule as

to payment and furnishing a health certificate. The money for the payment was finally sent, but no health certificate. We have no power to say that the health certificate could be dispensed with. It certainly is a reasonable and fair rule to allow the insured thirty days after having forfeited his policy in which to reinstate himself by paying up and showing that his health is good at the time he applies to be reinstated. It may be that in this case no such certificate could have been furnished, but, be that as it may, we hold that it was necessary for the deceased under the circumstances to have furnished the certificate. The facts herein narrated and in this record show no waiver. If the health certificate had been furnished, and the premium received by the company, within the thirty days, the forfeiture would have been waived. But in this case the premium was not accepted by the company. True, it was sent, but immediately the defendant wrote insisting upon the health certificate. It never by word or act showed any intention to reinstate deceased, without the health certificate. To hold that the mere receipt of the money order, under the circumstances, was a waiver, would be an innovation in the established rules of law applicable to insurance.

In regard to the second count, it is claimed that under the laws of New York the deceased should have been notified at least fifteen, and not more than forty-five, days before the premium became payable. Defendant proved by the witness Milair that on December 20, 1895, he prepared a notice in writing, stating the number of the policy, the amount of the premium, the place where it should be paid, and the person to whom it was payable; that said notice was addressed to John Nielsen, at St Helena; that "said notice was inclosed in a securely closed envelope, and the postage thereon was paid by the corporation, the Provident Savings Life Assurance Society, and such notice, so addressed and inclosed in such envelope, the postage prepaid thereon, was deposited by me in the general postoffice in the city of New York, on the twentieth day of December, 1895." This notice complied with all the statutory requirements.

The plaintiff argues in support of the third count that, under the laws of New York, therewas a sum exceeding five dollars in the reserve fund, which belonged to deceased, and this amount was more than sufficient to purchase temporary insurance from January 21, 1896, up to the date of death.

The statute of New York claimed to be applicable is as follows: "Whenever any policy of life insurance hereafter issued by any company organized or incorporated under the laws of this state, after being in force three full years, shall, by its terms lapse, or become forfeited, for the nonpayment of any premium, or of any note given for a premium, or loan made in cash on the policy as security, or of any interest on such note or loan, unless the provisions of this act are specifically waived in the application and notice of such waiver written or printed in red ink on the margin of the face of the policy when issued, the reserve on such policy, including dividend additions calculated at the date of the failure to make any of the payments above described, according to the American Experience Table of Mortality, and with interest at the rate of four and one-half per cent per annum, after deducting any indebtedness of the insured on account of any semi-annual or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing, shall, on demand made, with surrender of the policy within six months after such lapse, be taken as a single premium of life insurance at the published rates of the company at the time the policy was issued, and shall be applied as shall have been agreed in the application and policy, either to continue the insurance of the policy in force, at its full amount, so long as such single premium will purchase temporary insurance for that amount at the age of the insured at the time of lapse, or to purchase, upon the same life, at the same age, paid-up insurance, payable at the same time and under the same conditions, except as to payment of premiums, as the original policy." It will be observed that the statute is, in many respects, similar to section 450 of our Civil Code.

We do not deem it necessary to decide the much discussed question, as to whether or not the policy in this case is a regular life policy, or a policy for one year only, being renewed each time the annual premium is paid. Nor is it necessary to decide the meaning of "reserve fund," nor the question as to whether or not there was sufficient in the "reserve fund" to carry temporary insurance from the 21st of January, 1896, to the death of deceased. The policy was a contract, and is to be governed by the same rules that apply to all contracts. It had its inception in the issue of the policy, and was a

complete and entire contract for the payment of $2,500, within sixty days after satisfactory proofs of the death of the insured, provided such death should occur on or before the twenty-first day of January, 1894. By the payment of the annual premiums, the extensions of the policy were carried to the twenty-first day of January, 1896. The policy then read, with the extensions, that, in consideration of the third annual premium, the defendant would pay $2,500 upon the death of deceased, provided such death should occur on or before January 21, 1896. While the law abhors a forefeiture of a policy of insurance upon technical grounds, it will not keep it alive after it has expired by its express terms. Parties to an insurance contract have the right to agree upon and insert lawful conditions, stipulations and limitations in order to protect their respective interests, and these conditions and limitations, when made, must be construed and enforced, like all other contracts, according to the expressed understanding of the parties making them. It is not for the courts to dispense with such limitations and conditions, nor by judicial legislation to insert a different contract from that deliberately made by the parties. If, then, it be conceded that by the payment of the annual premiums the insurance contract was continued in the same manner as any regular life policy, and that on January 21, 1896, there was, in the surplus or reserve, sufficient due the insured to have paid for temporary insurance until his death, it by no means follows that by the terms of the contract, or of the statute, when read into it, the policy was renewed as a temporary policy after it expired. The statute says: "Shall on demand, with surrender of the policy within six months after such lapse, . . . . be applied as shall have been agreed in the application and policy, either to continue the insurance of the policy in force at its full amount, so long as such single premium will purchase temporary insurance for that amount, . . . . or to purchase, upon the same life, . . . . paid-up insurance." By this statute, the insured, while living, is given the option, upon surrender of the policy, to purchase "upon the same life," either temporary insurance or paid-up insurance. There are no words in the statute that will bear the interpretation that the law continues the insurance in any manner, without act of the parties. Because the insured forfeited his policy, or, in other words, neglected and refused to take out another annual

policy, the law does not say that he shall be deemed temporarily insured for such time as the reserve fund would have carried his insurance. If the insured had $5.10, or any other amount, in the reserve fund, for which he made no application during his life, it does not follow that upon his death his beneficiary in a policy that had expired can recover $2,500 upon a contract that was never made. A law that would bear such construction would be uncertain, unjust and lead to serious results. In case of death, months after a policy had lapsed, it might be claimed that the policy was continued because the company, upon an investigation and accounting, according to the tables of mortality and the insurance rates, had sufficient funds, which the insured had overpaid, to have continued the policy. In such case the question as to whether or not the deceased was insured would depend, not upon the terms of the contract, but upon an accounting and investigation, which in many cases would involve figures covering years of business. In this case the insured was charged the rate of $17.48 per thousand for his annual insurance, while the charge of regular life insurance at the age of forty-one—the age of the insured when his first policy was taken out—in a regular life company, according to the American Experience Table of Mortality, would have been $33.40 per thousand. The policy was therefore issued upon the basis of annual insurance at the age of the insured at the time he took out the policy. This is evident, not only from the proof as to the charge of regular life companies, but from the clause in the policy that the renewal premiums shall be "in accordance with the schedule rates." A table of such schedule rates is annexed to the policy, giving the annual premium per thousand, at the age of forty-one, $17.48; at the age of forty-two, $17.80; and on a gradual increasing scale up to the age of sixty, when it is $41.50. The policy provided that, after deducting the expense charge of $4 per thousand, the company would divide the residue as follows: "Such amount as shall be required for this policy's share of the death losses will be appropriated as a death fund, to be used solely in payment of death claims. The remainder will be retained as a guaranty fund." As the yearly premium of deceased was not increased, it may well be inferred that the difference in cost of his insurance in the second and third years was made up by a charge against the guaranty fund.

This view is further confirmed by the words of the statute, which say (speaking of the reserve), "shall be applied as shall have been agreed in the application and policy, either to continue the insurance," etc.

In the policy there is no agreement as to the application of the reserve fund to continue the insurance in any manner until after the payment of five annual premiums. The agreement is that the surplus shall be retained as a "guaranty fund," to be "used toward offsetting any increase in the premiums on this policy from year to year." Then follows a provision that after five full years' premiums have been paid, if the policy shall be terminated by nonpayment of premiums, eighty per cent of the guaranty fund will be applied to extend the insurance, provided application be made while the policy is in full force and effect. The interpretation we have given to the statute is not without authority. In the case of Blake v. National Life Ins. Co., 123 Cal. 473, 56 Pac. 101, the insured died without having paid the premium, and without having furnished the health certificate. The policy contained a stipulation that, although failure to pay an annual premium when due would cancel a policy, still, after three full annual payments, the company guarantees, "(1) without any action on the part of the insured, a paid-up policy for one thousand and eighty dollars; (2) upon surrender of his policy within two months, a cash value of five hundred and thirty dollars and twenty cents; (3) upon application within two months, to give extended insurance for the full amount of this policy for three years two hundred and fifty-eight days." The court in the opinion said: "Necessarily these were alternative propositions. Dr. Blake took neither, as, no doubt, his fixed intention was to have his policy renewed." In Knapp v. Insurance Co., 117 U. S. 412, 29 L. Ed. 960, 6 Sup. Ct. Rep. 807, the policy contained a clause that, after the payment of the two annual premiums, then, upon default in the payment of a premium, the insured should have the right to four-fifths of the net value of the policy, according to the combined experience or actuaries' rate of mortality, as a net single premium for temporary insurance, or, at his option, a paid-up policy for the full amount of the premium paid. The court in the opinion said: "But the proviso does not say that, upon a failure to surrender the original policy and to apply for a paid-up

policy, the original policy shall stand good for a temporary insurance, but that it 'shall be void and of no effect.' . . . . Taking the whole clause together, it is clear that the assured is to have the benefit of that sum in one of two ways, at her election, and that election must be made within a certain time. As that time expired without any election, or any excuse for not making one, the forfeiture became complete, under the express provisions of the policy, and the circuit court rightly held that the action could not be maintained." In Insurance Co. v. Barbour, 92 Ky. 430, 15 L. R. A. 449, 17 S. W. 796, the policy provided that, if default be made in the payment of any premuim after two annual premiums shall have been paid, "it will issue a paid-up, nonparticipating policy for as many tenth parts of the original sum insured as there shall have been annual premiums so paid, provided this policy be then freed from all indebtedness to the company, and provided, also, that written application be made therefor, and this policy, and all interest thereon, be surrendered in the lifetime of the insured, and within six months of the date of such default." It was held that the insured was not entitled to the paid-up policy unless he complied with the conditions in the original policy. In this opinion it is said: "It is not a case where the policy ceased pro tanto, and a portion of the insurance remained in force, but the entire policy determined. It had no value after a default in the payment of a premium. It is, however, provided that, inasmuch as the insured has made a certain number of payments, he shall, provided he does certain things, be entitled to a paid-up, nonparticipating policy for a certain sum. A new right is given to him, provided he does certain things. They are conditions precedent to the vesting of the right. It does not accrue until they are done": See, also, Stayner v. Equitable etc. Soc., 22 Misc. Rep. 53, 49 N. Y. Supp. 380; Thorensen v. Massachusetts Ben. Assn., 68 Minn. 477, 71 N. W. 669.

We are cited to two cases which it is claimed support a contrary view. We have carefully examined them, and, while we do not agree to all that is said in the opinions, we do not think they directly conflict with the views herein given. In Wheeler v. Connecticut etc. Ins. Co., 82 N. Y. 553, 37 Am. Rep. 594, the policy provided that if, after the payment of two or more annual premiums, the policy shall

cease and determine, by reason of default in the payment of any premium, then "this company will grant a 'paid-up policy' (payable as above) for such amount as the then present value of this policy will purchase as a single premium, provided that this policy shall be transmitted to, and renewed by, this company, and application made for such paid-up policy within one year after default in the payment of premium herein shall first be made." The complaint alleged that the policy was transmitted to, and received by, the company, and application made, but the company refused to issue a paid-up policy, as it had agreed to do. The remarks of the court were made in passing upon the demurrer, and it simply held that the complaint stated a cause of action. In Dorr v. Phoenix etc. Ins. Co., 67 Me. 439, the policy provided that, if default be made in the payment of premiums after two or more annual payments, then, upon surrender of the policy within twelve months, a "new policy will be issued . . . . for two-twentieths of the sum originally insured; if for three years, for three-twentieths; in the same proportion for any number of payments." Here was an express agreement to issue a new policy for a certain proportionate amount. The agreement was a part of the contract of insurance, and the insured had as much right upon default to the pro rata insurance as he had to rely upon the policy while in force. In the opinion the court used this language: "Dorr, then, up to June 29, 1874, was insured for the full amount specified in his policy. After that date to the time of his death, on March 4, 1875, he was insured for a 'part of the sum insured proportionate with the annual payments made.'"

The court, at the request of plaintiff, instructed the jury as follows: "The plaintiff alleges in her complaint that on January 21, 1896, the date when, according to the terms of the policy sued on, the seventh semi-annual premium thereon became due, there was a reserve on said policy of not less than five dollars, calculated as provided in said statute, and that said sum, taken as a single premium of life insurance at the published rates of the defendant at the time said policy was issued, was more than sufficient to purchase temporary insurance in the sum of twenty-five hundred dollars for the period of one month upon the life of John Nielsen at his age, on said 21st day of January, 1896. This is a

question of fact, which it is your province to determine, and, if from the evidence you find these allegations of the complaint to be true, you should bring in a verdict for the plaintiff for the said sum of twenty-five hundred dollars, with interest thereon at the rate of seven per cent. per annum from February 19, 1896, the date of said John Nielsen's death." The giving of the instruction was error. It was given upon the theory that, if there was a reserve sufficient to purchase temporary insurance, it was deemed to have been purchased. We have already endeavored to show that such is not the law. The instruction submitted to the jury, as a question of fact to be by them determined, whether or not "there was a reserve on said policy of not less than five dollars, calculated as provided in said statute." The substance of the statute of New York had been given to the jury, and the jury were directed to determine the fact as to whether or not there was a reserve calculated as provided in the statute. This instruction demonstrates the difficulties that would arise by the construction given by the court to the statute. If a jury are to determine as a question of fact certain calculations according to a statute, and upon their determination the question is to be finally determined as to whether or not a policy of insurance has expired or was continued in force, it seems that the business of insurance would be upon a very uncertain basis. No one would know, until the question was submitted to a jury upon the policy experience tables of mortality and the statute, as to whether or not a policy was continued in force.

It follows from what has been said that the judgment and order should be reversed.

We concur: Chipman, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

## LINCK v. JOHNSON.

L. A. No. 1102; November 9, 1901.

66 Pac. 674.

**Mechanic's Lien.—The Fact That a Contract, as to One Item,** is improperly set forth in the notice of a mechanic's lien, will not render the lien void as to the other items, concerning which the contract was correctly stated, but recovery can be had for all such items as are correctly stated.

**Mechanic's Lien.—Where, in an Action to Foreclose** a mechanic's lien, it is stipulated that defendant was at all times represented by her father as her agent in all the matters in controversy, that proof of such agency is unnecessary, and that her father attended to all business with plaintiff, evidence that such father told witness, when he wanted materials, to order them, and that when materials were wanted the father either ordered them or directed the witness to do so, is admissible to show authority for supplying extra materials.

**Mechanic's Lien—Foreclosure—Costs and Fees.**—Under Code of Civil Procedure, section 1195, providing that the court must allow, as a part of the costs on foreclosure of a mechanic's lien, the money paid for filing and recording the lien, and reasonable attorney's fees—such costs and fees to be allowed to lien claimants whose liens are established—a party establishing a claim is properly allowed such fees and costs where defendant makes no tender of the amount due, or offer to allow judgment for any sum.

APPEAL from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by F. X. Linck against Miss M. M. Johnson. From a judgment for plaintiff, defendant appeals. Affirmed.

Taylor & Forgy for appellant; C. J. Brown for respondent.

COOPER, C.—Appeal from judgment on a bill of exceptions. The action was brought to foreclose a lien for materials furnished by plaintiff, to be used, and which were used, in the construction of a building upon the premises described in the complaint. By the terms of the contract between the parties the plaintiff agreed to furnish to defendant certain moldings, turning, brackets and material for inside finish

for the sum of $410. The plaintiff complied with the contract, and the amount thereof, except the sum of $160, was paid by defendant. The complaint alleged the contract, and sought a decree for the recovery of the $160. It also alleged that the plaintiff furnished extra materials, to be used, and which were used, in the building, of the value of $55.60. The defendant in her answer admitted the balance due on the contract as alleged in the complaint, and that the further sum of $28.45 was due for extras, but denied that any further or greater sum was due. It was expressly alleged in the answer "that the total sum due plaintiff on account of the said contract and said extras is $188.45, and no more, and this sum said defendant is ready, able, and willing to pay." The real amount in dispute, according to the verified pleadings, is the sum of $27.15. By the judgment the court found that the amount due plaintiff for extras is $26.30, which is forty-five cents less than is admitted by the answer to be due. The judgment was for the balance due under the contract, $160, for $26.30 for extras, with interest upon said amounts at the legal rate, for $20 attorneys' fees, and for costs, and that the same be declared a lien upon the premises, and that they be sold to satisfy said judgment. The real amount now in controversy is the attorneys' fees and costs. It is claimed that the evidence shows a variance from the contract set forth in the notice of lien. The notice of lien states that the extras were furnished for their reasonable value, and that no price was agreed upon; that they were furnished upon an implied contract. The evidence showed that in the sum total of extras was an item of $11.75 for small doors, which were furnished at the agreed price of $11.75. There was a variance as to the said item, and the court excluded it. After the exclusion of this item there was no variance. We cannot hold that because the contract, as to one item, was improperly set forth in the notice of lien, the lien was void as to all other items concerning which the contract was correctly stated. If such rule were adopted, it would result in almost wholly defeating the purposes and objects of the lien law. It is sufficient to hold that no recovery can be had, except for such materials as were furnished under the terms of the contract set forth in the notice of lien. It was not error to allow the witness Dougherty to testify as to giving orders

for the materials claimed to be extras. The witness testified that Johnson (defendant's father) told him when he wanted materials to order them, and that when materials were wanted Johnson either ordered them or directed witness to do so. At the beginning of the trial it was stipulated between the parties "that said defendant was at all times represented by her father, G. R. Johnson, as her agent in all the matters in controversy herein; that proof of such agency is unnecessary; and that said G. R. Johnson attended to all the business with plaintiff."

The plaintiff was properly allowed costs and attorneys' fees: Code Civ. Proc., sec. 1195. Defendant did not make any tender of the amount due, nor any offer to allow judgment to be taken against her for any sum, and therefore is not protected by any provision of the code as to costs.

This case illustrates the fact that many appeals are brought to this court that involve no sum of importance and no principle of law. It would tend greatly to aid this court in clearing its calendar if the members of the bar would not burden us with appeals upon frivolous or technical questions, in which no principle is involved, and the amount is not sufficient to pay the costs of printing the transcript.

The judgment should be affirmed, with $100 damages to plaintiff.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed, with $100 damages to plaintiff.

## PEOPLE v. COXE.

Cr. No. 783; November 21, 1901.

66 Pac. 725.

**Embezzlement—Demand for Return.**—Where, on trial for embezzlement, admissions made by the defendant show a fraudulent and felonious taking of the money, which he is charged with having embezzled, evidence of an independent demand for its return is unnecessary.

APPEAL from Superior Court, Los Angeles County; B. N. Smith, Judge.

John H. Coxe was convicted of embezzlement and he appeals. Affirmed.

W. H. Shinn, Clifton Astell and C. B. Ladd for appellant; Tirey L. Ford, attorney general, for the people.

PER CURIAM.—The defendant has been convicted of the crime of embezzlement, and appeals from the judgment and order denying his motion for a new trial. The main proposition advanced by him upon his appeal is to the effect that the evidence is insufficient to support the verdict. The court has examined the evidence with care, and is satisfied that the claim made is without merit. It is insisted that the evidence is fatally weak, in this: that no demand was made upon defendant for the return of the money. In view of the fact that the admissions made by defendant show a fraudulent and felonious taking upon his part of the money which he is charged with having embezzled, evidence of an independent demand was not necessary.

The instructions given to the jury by the court bearing upon the question of flight is not erroneous. The same instruction, in substance, was given in the case of People v. Bushton, 80 Cal. 163, 22 Pac. 127, 549, and there approved as containing a sound exposition of the law. There is no merit in the appeal.

For the foregoing reasons the judgment and order are affirmed.

# HIBERNIA SAVINGS AND LOAN SOCIETY v. COCHRAN et al.*

S. F. No. 2853; November 21, 1901.

66 Pac. 732.

**Judgment—Motion to Vacate—Appeal.—Where on Appeal from the Denial** of defendant's motion to vacate the judgment, respondent moves to dismiss on the ground that the order is not appealable, because the judgment is itself appealable, the motion will be denied, since whether the grounds relied on for the appeal would have been available on an appeal from the judgment involves an examination of the record.

**Judgment—Appeal from Order Refusing to Vacate.**—Under Code of Civil Procedure, section 939 (3), authorizing an appeal from a special order made after judgment, an appeal lies from an order refusing to vacate a judgment.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Hibernia Savings and Loan Society against Leon H. Cochran and others. From an order denying a motion to vacate the judgment, and to set aside default and appearance of the defendant Cochran, and to dismiss the action, he appealed. Motion to dismiss the appeal. Motion denied.

A. Boyer for appellant; Tobin & Tobin for respondent.

PER CURIAM.—Motion to dismiss appeal. Judgment was rendered herein February 2, 1901, and thereafter appellant gave notice of a motion to vacate the judgment, and to set aside default and appearance of the defendant Cochran, and to dismiss the action. Upon the hearing the court denied the motion. The appeal herein is from this order. The respondent has moved to dismiss the appeal upon the ground that the order is not appealable; that the appeal is from an order refusing to vacate a judgment which is itself appealable. Whether the grounds relied upon for the appeal from the order would have been available upon an appeal from the

*For subsequent opinion, see 141 Cal. 653, 75 Pac. 315.

judgment involves an examination of the record, and for that reason cannot be considered upon a motion to dismiss the appeal. The order refusing to vacate a judgment is in its very nature a special order made after judgment, from which section 939 (3) of the Code of Civil Procedure authorizes a direct appeal.

The motion is denied.

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## LEACH v. CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY et al.*

S. F. No. 2369; November 23, 1901.

66 Pac. 786.

**Appeal.—Where There is No Substantial Conflict in the evidence, but it is all against the finding by the court, such finding will be set aside on appeal.**

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by Ivy Leach against the California Safe Deposit and Trust Company and others. Judgment for defendants. Plaintiff appeals. Reversed.

A. G. Booth and J. T. Campbell for appellant; J. P. Rodgers, R. F. Crawford, W. B. Haskell, F. A. Meyer and M. V. Samuels for respondents.

PER CURIAM.—This is an action to determine the ownership of two hundred and twenty-five shares of the capital stock of defendant trust company. Plaintiff claims the property as a gift from Priscilla Wilson in her lifetime. The cause was tried by the court, and judgment passed for defendant Pierce, as administrator, the trial court finding that there was no gift. The sufficiency of the evidence to support that finding of fact is the only matter raised upon this appeal.

It is only in exceptional cases that this court will reverse the trial court upon its findings of fact. If there be a sub-

*Rehearing denied December 24, 1901.

stantial conflict in the evidence, it will never be done. At the same time, if there be no substantial conflict in the evidence—if the evidence is all one way, and that way is against the finding—then it is the duty of the court to set aside the finding, and it will do so without hesitation. The court has concluded that such a case is presented by this record. The evidence of all the witnesses has been examined with care, and that evidence points unequivocally to the fact that this personal property constituted a gift to plaintiff from the deceased, Priscilla Wilson, prior to her death. If the evidence of disinterested witnesses is to be believed, then such is the fact. There is no evidence contradictory to the testimony of those witnesses, and we find nothing in that testimony inconsistent in itself. Theories and conjectures cannot take the place of evidence, and, measured by the record, the finding of fact to the effect that there was no gift has no support in the evidence.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

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## REID v. KOWALSKY.

S. F. No. 2771; November 27, 1901.

66 Pac. 851.

**Appeal—Settlement of Bill of Exceptions.**—Where the only defense to a motion to dismiss an appeal is that the trial court has refused to settle a bill of exceptions, and that mandamus is pending in the appellate court to compel such settlement, on refusal of the writ of mandamus the appeal will be dismissed.

APPEAL from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by J. F. Reid against Henry I. Kowalsky. From a judgment for plaintiff defendant appeals. Dismissed.

A. A. Sanderson for appellant; J. S. Reid for respondent.

PER CURIAM.—Motion of respondent to dismiss appellant's appeal from an order of the court below dismissing his

proceedings for a new trial. The only answer to the motion is that the judge of the lower court had refused to settle a bill of exceptions on said motion, and that a proceeding in mandamus was pending in this court to compel the settlement of said bill. Judgment, however, was this day rendered in said mandamus proceeding denying the writ. Such judgment disposes of the only defense to the present motion: See Kowalsky v. Kerrigan, 134 Cal. 590, 66 Pac. 850.

The motion is granted and the appeal is dismissed.

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## PEOPLE v. JOY.

Cr. No. 787; December 7, 1901.

66 Pac. 964.

**Burglary—Evidence.—Defendant was Found at Night, Less Than an Hour** after a malt-car was burglarized, and less than two blocks from the car, with two other boys, each having on his shoulder a sack of the stolen malt. Defendant's companions escaped, but he was seized in the act of dropping the malt. He refused to explain to the officer what he was doing with the malt, and on his preliminary examination testified that he did not remember anything of his arrest, or that he had any conversation with the officer, or that he had any sack in his possession, or was in company with anyone at the time of his arrest. At the trial he testified that he was intoxicated on that evening; that he met three persons, who had four sacks of malt with them; and that he, at their request, assisted in carrying one of the sacks for them. Held, that defendant's conduct in refusing to answer the officer, and his failure of memory at the preliminary examination, followed by his recollection of an important fact in his favor on the trial, betrayed guilt, which, corroborated by the fact of the possession of the stolen property, was sufficient to support a conviction.[1]

**Burglary—Evidence.—An Officer Accosted Defendant at Night** with stolen malt in his possession, and asked him what he was doing

[1] **Cited** and followed in State v. Sparks, 40 Mont. 87, 135 Am. St. Rep. 608, 105 Pac. 89, it being said there that the finding of the property, soon after its having been taken from its owner, in the possession of the accused, if proved, together with circumstances showing guilty conduct, amounts to presumptive evidence not only of the larceny, but also that such person "made use of the means by which the property was acquired."

with that; whereupon defendant replied that he was no chicken, and was not going to tell. Held, that such statement was a mere declaration of the defendant against interest, and not a confession, and was therefore admissible without a foundation showing that the statements were voluntary.

**Criminal Law—Evidence Given at Preliminary Examination.**—On a criminal prosecution parts of the testimony of a police officer, given at the preliminary examination of the defendant as to a conversation between the officer and defendant, may be read to the officer to refresh his memory.

**Criminal Law—Evidence Given at Preliminary Examination.**—An objection to the reading of the testimony of a police officer given at the preliminary examination, on the trial, to refresh his memory, merely reciting that it is an objection to the testimony of the lower court on the pretense that it is used to refresh the memory of the witness or for any other purpose, without any objection to the evidence as incompetent, secondary or hearsay, is insufficient.

APPEAL from Superior Court, City and County of San Francisco; W. P. Lawlor, Judge.

James Joy was convicted of burglary, and he appeals. Affirmed.

John S. Partridge and A. W. Lyser for appellant; Tirey L. Ford, attorney general, and C. N. Post, deputy attorney general, for the people.

GRAY, C.—The appellant was charged with burglary in having entered a freight-car of the Southern Pacific Company in San Francisco with intent to commit larceny therein. There was also a charge of a prior conviction of petit larceny against appellant. The prior conviction was confessed, and on a trial the defendant was convicted of burglary in the second degree, and sentenced to five years in the state prison.

1. The first contention for a reversal of the judgment is that there was no evidence against defendant except the finding of some malt stolen from the burglarized car, in his possession soon after it was stolen. The evidence touching the matter is as follows: The defendant is twenty-two years of age, and with three other boys he was found about two blocks from the said car at 8 o'clock in the evening, and less than an hour after the burglary was committed. Each of said boys had on his shoulder a sack of malt that had just

previously been stolen from said car. On being approached by a police officer, the boys, other than defendant, dropped the sacks of malt and ran away, but the police officer seized the defendant as he was in the act of dropping the malt from his shoulder. The officer then asked defendant what he was doing with that, and defendant replied that he was no chicken, and was not going to tell. Defendant was then taken into custody. At his preliminary examination the defendant was a witness, and testified, in substance, that he did not remember anything of his arrest, or that he had any conversation with the officer, or that he had any sack in his possession, or that he was in company with anybody at the time of his arrest. In short, his mind seems to have been a blank at the preliminary examination as to all matters connecting him with the sack of malt found in his possession. Upon the trial of his case, however, he testified that on the night of the alleged burglary about 8 o'clock in the evening, he was coming down Broadway street, and was pretty full; that he met three persons on the corner of Broadway and Front, and they had four sacks of malt with them; that they stopped him, and asked him to give them a hand, and he did so he took one sack, and they told him to "pack it as far as the corner with them." We think the defendant's conduct at the time of his arrest manifested a guilty conscience; and his failure of memory at the preliminary examination, followed by his recollection of an important fact in his favor on the trial, argues an attempt at concealment on the former occasion or falsehood on the latter. The defendant's conduct betrays guilt, and corroborated by the fact of the possession of the stolen property so near to the scene of the crime, and so soon after its commission, is sufficient to support the verdict of guilty. It cannot be said, in view of this evidence, that the fact of possession stood alone and uncorroborated: See People v. St. Claire, 5 Cal. Unrep. 294, 44 Pac. 234; People v. Luchetti, 119 Cal. 501, 51 Pac. 707.

2. There was no evidence of a confession introduced or offered, and hence there could be no necessity for laying a foundation for such evidence by showing that the statements of defendant offered in evidence were made voluntarily. The most that could be said of defendant's statements given in evidence is that they were mere declarations against interest, and in no sense were they confessions.

3. There was no error in reading to the police officer, while a witness at the trial, parts of his testimony given at the preliminary examination for the purpose of refreshing his memory as to the conversation between himself and the defendant. Besides, no proper ground was stated for the objection made by defendant. The objection as stated was: "Now, I will object to any introduction of the testimony of the lower court on the pretense that it is used to refresh the memory of the witness or for any other purpose." No objection was made that the evidence was incompetent or secondary or hearsay or anything of that kind.

The judgment and order denying a new trial should be affirmed.

We concur: Cooper, C.; Smith, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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## PEOPLE v. ARDELL.

Cr. No. 804; December 10, 1901.

66 Pac. 970.

**Larceny—Testimony of Accomplice—Corroboration.**—On a prosecution for the larceny of $280 it appeared that the defendant knew of the money being in the pocket of the prosecuting witness, and that he, with others, drank with the defendant, and then went with him to a dance-hall, where the money was taken by a woman. On the prosecuting witness making complaint, defendant told him he would try to get back the money, and he got the witness out of town that night. When the prosecuting witness returned, and had the woman arrested, defendant gave him $40, and induced the witness to attempt to have the prosecution dismissed, which the witness did not succeed in doing, and defendant again sent witness out of town. Defendant then fled from the state, and when found was living under an assumed name. Held, that the circumstances were sufficient to corroborate the testimony of an accomplice as to defendant's guilt.[1]

[1] Cited in the note in 98 Am. St. Rep. 173, on conviction on the testimony of an accomplice.

**Larceny—Accomplice.—On a Prosecution for Larceny, Evidence** as to a conversation between the prosecuting witness, defendant and another in regard to having a prosecution against an alleged accomplice of defendant, growing out of the robbery, dismissed, was properly received to show the defendant's solicitude in settling the matter.

**Criminal Law.—Evidence Received Without Objection** will not be struck out on motion.

APPEAL from Superior Court, Fresno County; E. W. Risley, Judge.

Charles Ardell was convicted of grand larceny and he appeals. Affirmed.

S. J. Hinds for appellant; Tirey L. Ford, attorney general, for the people.

COOPER, C.—Defendant was convicted of grand larceny, committed by the felonious stealing of $280 from the person of one Heath. He appeals from the judgment and an order denying his motion for a new trial.

One Trixy Lewis, who was an accomplice, testified fully as to the facts. Her testimony, if true, showed defendant's guilt beyond question; but it is claimed that there is not sufficient evidence, aside from that of the accomplice, tending to connect the defendant with the commission of the offense. We have carefully examined the evidence, and find it fully sufficient within the rule. The defendant claimed to be a friend of Heath, and knew of the money being in Heath's pocket. He participated in drinking at his own saloon, prior to the robbery, with Heath, Trixy Lewis, "Missouri Kid" and others. He went with all these parties, in the late hours of the night, to a dance at a dance-hall kept by "Missouri Kid" in the outskirts of Fresno. After the woman, Lewis, had danced with Heath, taken him into a crib adjoining the dance-hall and taken the money out of his pocket, he made complaint to defendant and others. Defendant pretended to be sorry, and apparently cried. He told Heath to say nothing about it, and he would try to get the money back. He sent Heath to San Francisco the same night on the 1 o'clock train, gave him half a dozen cigars, some whisky and a letter of introduction to "Spider Kelley." Heath returned

to Fresno in a day or two, and had the woman arrested. Defendant tried to get Heath to dismiss the case against the woman, gave him $40, and told him to go to the judge, and tell him that he had not been robbed; that one Brooks had taken his money while he was drinking to keep for him; and to ask the judge to dismiss the case, and for Heath to pay the costs. Heath did not succeed in getting the case dismissed, and defendant gave him the $40, and sent him by the Owl train, the same night, to Santa Monica. Defendant fled from the scene of the crime, and when arrested was found in Plattsmouth, Nebraska, going under the assumed name of Frank Perry. Heath testified, without objection, to a conversation with one Brooks and defendant, in regard to getting the case against Trixy Lewis dismissed—being the conversation at the time defendant gave Heath $40—and told him to tell the judge he had not been robbed. Defendant, after the evidence was given, moved to strike it out as irrelevant and incompetent. The motion was properly denied. The evidence was material, and tended to show the solicitude of defendant as to settling the matter. Besides, having been received without objection, it was not error to refuse a motion to strike it out: People v. Rolfe, 61 Cal. 543.

Complaint is made of the refusal of the court to give certain instructions offered by defendant. The portions of the instructions material to the issues were sufficiently given in other parts of the charge, and we find no error in the rulings complained of. The court fully and fairly instructed the jury as to all legal propositions involved in the case. It is not incumbent on the court to give instructions which are purely argumentative, or which have no proper foundation in the evidence, or which have been already given.

The judgment and order should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## PEOPLE v. LAPIQUE.*

Cr. No. 793; December 17, 1901.

67 Pac. 14.

**Forgery.—The Information Charged Defendant With Forging a Note** purporting to have been executed to L. by M., and also with forging L.'s indorsement, and with uttering such forged instrument. At the trial the court withdrew the charges as to the indorsement and uttering, and instructed the jury to consider only the charge of forging the note itself. Held, that, the first charge being sufficient in itself, the contention of defendant on demurrer that the information was fatally defective by the insufficiency of the other charges was without merit.

**Forgery.—By the Withdrawal of the Alleged Defective Charges,** and the instruction given to the jury that they should consider only the charge admitted to be sufficient, any error which may have been made in overruling the demurrer to the information was rendered harmless.

**Forgery.—On a Prosecution for Forgery, Wherein Genuine Specimens** of the handwriting of defendant and of prosecuting witness were introduced, an expert on handwriting compared these exhibits, in the presence of the jury, with the signature to the note alleged to have been forged, and illustrated by drawings on a blackboard and by photographs the points of similarity and dissimilarity between them, and gave his opinion that the signature to the note was copied from the genuine signature of the prosecutor. There was evidence that defendant had had an opportunity to make such copy. Held, that, the genuineness of the signature being a question for the jury, the appellate court, not having the various examples of handwriting, blackboard illustrations and photographs before them, would not say that the evidence did not justify the jury in finding defendant guilty of forging the signature.

**Forgery—New Trial.—On a Prosecution for Forgery,** wherein the prosecutor testified that he did not sign the note in question, and two other witnesses testified that he had admitted the signature to be genuine, newly discovered evidence that the prosecutor had admitted that the signature to the note had been placed there by himself is not ground for a new trial, since it was merely cumulative and impeaching.

**Forgery—Evidence of Motive.—On a Prosecution for Forgery,** evidence that the party whose name was alleged to have been forged had money in bank and a house free from encumbrances, and that

*For subsequent opinion in bank, see 136 Cal. 503, 69 Pac. 226.

defendant knew him to be a man of means, is admissible to show the motive for the forgery.

**Forgery.—An Instruction to the Jury in a Prosecution** for forgery that, "if the prosecution does not show or establish by proof sufficient to convince you beyond a reasonable doubt that the defendant had no authority to sign the name" of the prosecutor, "then you must acquit the defendant," taken in connection with other instructions implying that the jury must also be satisfied as to the false character of the signature and that it was made by defendant, is not erroneous, as assuming that defendant made the signature in question.[1]

**Forgery—Instructions.—On a Prosecution for Forgery,** under an information containing three separate charges, the first of which was sufficient, the court instructed the jury to disregard the second two charges, and to consider only the first. Held, that the jury was presumed to have obeyed the instruction of the court, and their verdict of "guilty as charged in the information" was sufficient.

APPEAL from Superior Court, City and County of San Francisco; F. H. Dunne, Judge.

From a judgment convicting John Lapique of forgery and an order denying his motion for a new trial he appeals. Affirmed.

Theodore J. Roche for appellant; Tirey L. Ford, attorney general, A. A. Moore, Jr., deputy attorney general, and Lewis Byington, district attorney, for the people.

GRAY, C.—The defendant was convicted of forgery, and sentenced to nine years in the state prison. He appeals from the judgment and from an order denying his motion for a new trial.

1. Appellant contends that the information is insufficient, and that the demurrer thereto should have been sustained. The information charged defendant with forging an instrument in writing consisting of a promissory note for $800, purporting to be executed to one Louise Lagarde by one Maysounave, with intent to defraud the said Maysounave.

[1] Cited by defendant in State v. Blaine, 45 Mont. 487, 124 Pac. 518, but, as the court there said, not supporting his position, which was more in the nature of the instruction asked for by the defendant in the case cited, only to be refused by the court, which then framed its own instruction instead.

The information further charges that defendant forged the indorsement of the name "Louise Lagarde" on the back of said instrument in writing, and also, with intent to defraud said Maysounave, uttered, published and passed said forged instrument as true and genuine. It is conceded that this information charges but one offense: People v. Leyshon, 108 Cal. 440, 41 Pac. 480; People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581. It is contended, however, that the information must, for the purpose of determining the sufficiency of its allegations, be treated as if it was intended to charge three distinct offenses—the first being the forgery of the note; the second, the forgery of the indorsement; and, third, the uttering of the forged instrument; and it is claimed that the information fails to state the time and place of the forging of the indorsement, and therefore the information is fatally defective. We do not think this can be true. The information is full and complete as to the charge of forging the note. Indeed, it seems to be conceded that the information states facts sufficient to show that defendant committed the crime of forgery as to the note, and we think this concession is well founded. A reason for disregarding that portion of the information relating to the indorsement, and also the portion relating to the uttering and passing of the instrument, arose at the trial. There was no evidence tending to show any uttering or passing of the instrument as indorsed, and no evidence that the indorsement of the name "Louise Lagarde" was forged; and accordingly the jury were instructed by the court that as to those charges the prosecution had failed to make out a case and defendant could not be found guilty thereon. The court withdrew these two charges from the consideration of the jury, and instructed the jury that they were to consider the evidence and determine the facts with regard only to the charge of forging the note. The case then went to the jury on the single charge last referred to, and any error that may have been made in overruling the demurrer to the information was thus rendered harmless to the defendant.

2. It is next urged that the evidence is insufficient to justify the verdict, in that it was not shown that defendant forged the signature to the note. Upon the trial Maysounave testified, in substance, that the name signed to the note in question was not signed by him or with his authority. The

note alleged to have been forged was introduced in evidence, and this was followed with exhibits of the handwriting of defendant and of Maysounave. An expert witness on handwriting (Kytka by name) compared these various exhibits with the signature to the note in the presence of the jury, and pointed out and illustrated by drawings on a blackboard and by photographs the points of similarity and dissimilarity between the handwriting of the defendant and the signature to the note. He also compared the handwriting of Maysounave with the signature in the same way. He also similarly illustrated and gave it as his opinion that the signature to the note was copied from a genuine signature of Maysounave, regarding which there was some substantial evidence tending to show that it had been in the possession of defendant at a time when he might have copied from it the said signature to the note. The witness Kytka did not in so many words give it as his opinion that the signature to the note was in the same handwriting as the admitted exhibits of defendant's handwriting, but, so far as we can discern from the record before us, he made it to appear by his illustrations and comparisons that they were all written by the same hand. These various examples of handwriting and illustrations on the blackboard and photographs are not before us, and consequently we are not in a proper position to review the action of the jury on the questions of fact vital to the case. This can be best illustrated by quoting from an instruction given to the jury, at the request of appellant, as follows: "In regard to the signature in question, the jury is at liberty to use their own judgment and knowledge in matters of handwriting, and are not legally compelled to follow the opinion of any handwriting expert. The question of the genuineness or falsity of the signature is to be decided not according to the testimony of experts only, but by the jury, themselves, from their own consideration of the exhibits before them." The defendant cannot be heard to say that the above is not good law, and, if it is good law, it will be readily seen that the jury had advantages for arriving at the truth respecting the facts which we do not possess, and it would therefore not be proper to attempt here to review its action. For the same reason, it is unnecessary to review the somewhat extended argument of counsel for appellant on this point.

3. One of the grounds of the motion for new trial was newly discovered evidence shown by an affidavit in which the affiant stated, in substance, that Maysounave had on a certain occasion admitted that the signature to the note in question was placed there by himself. This kind of evidence would tend only to contradict and impeach the witness Maysounave, and newly discovered evidence of this character is not ground for a new trial: People v. Loui Tung, 90 Cal. 377, 27 Pac. 295. Two witnesses testified at the trial that the prosecuting witness admitted that the signature was genuine. The newly discovered evidence was therefore merely cumulative, which is another reason for rejecting it as a ground for new trial.

4. That Maysounave was a man of some means, and the defendant knew the fact, was proper to be shown as indicating motive for the forgery. He would hardly forge the signature of a man known by him to be execution proof, if he intended to force payment by the alleged maker of the note, as it appears he attempted to do in this case. The objections to the questions as to the money in the bank to Maysounave's credit, and as to his lodging-house being free from encumbrances, were therefore properly overruled. There was other evidence in the case tending to show that defendant knew the solvent condition of Maysounave.

5. The court instructed the jury that, "if the prosecution does not show or establish by proof sufficient to convince you beyond all reasonable doubt that the defendant had no authority to sign the name of Philip Maysounave, then you must acquit the defendant." This instruction is complained of as assuming that defendant did sign the name of the complaining witness to the note. We see no such assumption in it, even standing alone; but it does not stand alone. The other instructions clearly imply that the jury must also be satisfied as to the false character of the signature, and that it was written by the hand of defendant. That the instructions must be read together, and so construed, has been frequently held. The prosecuting witness testified that he did not authorize anybody to sign the note for him.

6. The verdict of "guilty as charged in the information" is sufficient. By the instructions of the court, the only part of the information submitted to their consideration was the

charge as to the forgery of the note itself. All else was clearly withdrawn, and the jury instructed to disregard it. They are presumed to have obeyed the instruction, and their verdict will be applied to the information as it was finally submitted to them.

There are some other objections urged by appellant, but, on examination, we think they are not of a character to require special discussion.

We find no prejudicial error in the record, and advise that the judgment and order appealed from be affirmed.

We concur: Haynes, C.; Smith, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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## WARREN et ux. v. SOUTHERN CALIFORNIA RAILWAY COMPANY.*

L. A. No. 951; December 18, 1901.

67 Pac. 1.

**Railroads.—Plaintiff Set Out an Ordinance Limiting the Speed** of railway trains, and then alleged that a train running at a great rate of speed by reason of said negligence struck plaintiff. A special demurrer to the complaint as ambiguous in not stating whether the negligence charged was a violation of the ordinance was overruled. Held, that, if error, it was not prejudicial, as the general allegation of negligence supported the cause of action, and would permit evidence of a violation of the ordinance.

**Appeal.—The Rule That Error, to Work a Reversal,** must be prejudicial, applies to error in overruling demurrers to complaints on ground of ambiguity.

**Railroad Crossing—Contributory Negligence.—Plaintiff was in a Wagon,** which another was driving. When within two hundred or three hundred feet of the crossing, the driver took the whip in her hand and slowed the horse to a walk, looking to the east, in which direction the view was unobstructed for one thousand feet. Thereafter the view in that direction became obstructed until a point

*For subsequent opinion in bank, see 138 Cal. 1, 70 Pac. 926.

twenty-five feet distant from the track, and at this point they looked to the west, and then, turning to the east, saw a train approaching, by which time the horse was but a few feet from the track, and the driver attempted to hurry across, but the wagon was struck, and plaintiff injured. Held, that the question of contributory negligence was for the jury.

**Railroad Crossing—Contributory Negligence.—The Horse Being Afraid** of the cars, and the question whether to attempt to cross or to turn down the embankment being one to be decided on the instant, the attempt to cross, even though a mistake, did not establish contributory negligence.[1]

**Railroad Crossing.—A General Verdict for Plaintiff Being Supported** by evidence, a finding on a special issue that the horse was not under control immediately prior to the accident, though without support in the evidence, was not in substantial conflict with the general verdict.[2]

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by A. A. Warren and his wife against the Southern California Railway Company. Judgment for plaintiffs and defendant appeals. Affirmed.

C. N. Sterry and Henry J. Stevens for appellant; J. P. Hight and L. M. Sprecher for respondents.

GAROUTTE, J.—Plaintiff Betsey Warren and her daughter, Mary Green, a woman of mature age, were returning to their home in a small market wagon, drawn by one horse, and when crossing the railroad track over C street, in the city of San Bernardino, a collision occurred with an engine attached to a moving train of cars of defendant, and as the result plaintiff was injured and Mary Green was killed. The present action was brought to recover damages for the injury sustained by plaintiff Betsey Warren. Judgment went in her favor, and an appeal is prosecuted from the judgment and order denying a motion for a new trial.

[1] Cited in the note in 37 L. R. A., N. S., 44, on care required of one in a sudden emergency.

[2] Cited and followed in Gallegos v. Sandoval, 15 N. M. 223, 106 Pac. 375, where there was a general verdict for the plaintiff with certain special findings alleged to be inconsistent with it.

It is asserted that the special demurrer to the complaint should have been sustained. This demurrer was directed to an allegation which stated that the city of San Bernardino had upon a certain day enacted an ordinance whereby it was declared unlawful for a railroad train to travel within the city limits at a greater rate of speed than ten miles an hour. This allegation was followed by another to the effect that the ordinance was in full force and effect at the time of the accident. There was an allegation in the complaint alleging: "That defendant, not regarding its duty, so negligently and carelessly operated and managed one of its trains of cars . . . . that on said thirteenth day of March, 1899, when said Betsey Warren had reached said crossing and was thereon in said spring wagon, said train of defendant, while moving at a great rate of speed, driven and propelled by steam, and by reason of the said negligence of said defendant, struck the said spring wagon in which said Betsey Warren then and there in the said city of San Bernardino was, and the said Betsey Warren then and there, by reason of the said negligence of defendant, was violently thrown from said spring wagon a great distance into the air," etc. The ambiguity and uncertainty of the pleading is claimed to lie in the fact that it cannot be determined whether or not the plaintiff was charging negligence against defendant based upon a violation of the ordinance. The general allegation of negligence above set forth was sufficient to support a cause of action: House v. Meyer, 100 Cal. 592, 35 Pac. 309; Stephenson v. Southern Pac. Co., 102 Cal. 146, 34 Pac. 618, 36 Pac. 407; Cunningham v. Los Angeles Ry. Co., 115 Cal. 566, 47 Pac. 452. But the ordinance, as set out, appears to be a mere matter of surplusage, for there is no allegation that the defendant was violating it when the accident occurred. Again, under the general allegation of negligence, a violation of a municipal ordinance, such as this one, could be shown without pleading it, for its violation would be negligence: Siemers v. Eisen, 54 Cal. 418. Beyond all this, the doctrine of Alexander v. Central etc. Mill Co., 104 Cal. 536, 38 Pac. 411, may be here invoked. It is there said: "It is not in all cases where error has been committed by trial courts in overruling demurrers to complaints upon the grounds of ambiguity or uncertainty that

this court will order a reversal of a judgment based upon a trial of the issues made by the complaint and answer. The same rule applies to errors of this character as is invoked as to all other errors of the court. It must not be mere abstract error, but it must be prejudicial and injurious error in order to avail appellant, for otherwise he has no cause of complaint." There was no substantial error in the order of the court overruling the demurrer.

In view of what has been said, there is nothing of merit in the second point discussed by defendant, as to the order of the court setting aside its order theretofore made striking out a portion of the pleading.

Should a nonsuit have been granted? In looking at this question the evidence will be taken most strongly against the railroad company. As to the negligence of the company there can be no question, for it was operating its train within the city limits of San Bernardino at a rate of speed of thirty or forty miles an hour, and in violation of a municipal ordinance. Again, prior to crossing C street, neither a whistle was blown nor a bell rung. Negligence upon its part being thus established, can it be said, as matter of law, that the plaintiff was guilty of contributory negligence? And by this interrogatory the court is brought to an examination of the more important facts of the case. Mrs. Green was driving the horse, and, as far as the questions here concerned are involved, it will be assumed that she and plaintiff stood on common ground as to the legal duties and responsibilities resting upon each. Their horse was afraid of the cars, and they selected this particular crossing over the track for the reason that it was considered the safer. It thus appears that at all times they had in mind the danger involved in crossing the railroad track. When within two hundred or three hundred feet of the crossing, Mrs. Green began to prepare for it by taking the whip in her hands, and when one hundred and ten feet from the crossing she slowed the gait of the horse to a walk, and looked at the track to the east, where her view was unobstructed to the distance of one thousand feet. Thereafter the view to the east became obstructed until they arrived at a point twenty-five feet distant from the center of the track. At this point they looked to the west, and saw no

train. Then turning, and looking to the east, they saw a train approaching. At this moment of time the horse was but a few feet from the track, and Mrs. Green then struck him with the whip, in order to cross the track. But the engine collided with one of the back wheels of the wagon, and the accident occurred. From this state of facts the court is satisfied that the case was properly left to the jury. It is not prepared to say, as matter of law, that plaintiff should have done more, and stopped and listened for an approaching train. It is contended that when Mrs. Green saw the approaching train she should have turned her horse to the right down an embankment, where there was safety. At the moment she struck the horse with the whip and attempted to cross the track, the engine was distant about one hundred and fifty feet. The nature of the accident indicated that, if the train had not been traveling at a great rate of speed, there would have been no injury. The horse was afraid of the cars, and it was an open question whether it was better to attempt to cross the track or to turn down the embankment. It was a question to be decided upon the instant, and, even conceding these women decided it wrongly, that decision does not conclusively establish contributory negligence on their part. It is said in Green v. Lumber Co., 130 Cal. 435, 62 Pac. 747: "If the danger of collision is hanging right over a passenger's head, the proprieties and niceties usually demanded of passengers in alighting from trains certainly need not be observed to their full extent. Under these circumstances a person does not stand and ponder upon the order of his going, but goes at once. A safe or unsafe spot may be chosen upon which to alight from the car. If the spot be unsafe and dangerous, that fact of itself will not necessarily defeat a right of recovery, even though a safe and secure spot was at hand, and equally ready of access." And here this principle is applicable, for the court cannot say, as matter of law, that plaintiff was negligent in placing herself in the position where she was at the moment Mrs. Green struck the horse with the whip. As already stated, defendant was moving its train within the confines of the municipality at a great rate of speed, probably of itself constituting negligence upon its part, regardless of the violation of a municipal ordinance.

It was doing this without giving any notice to the inhabitants of the municipality whatever, either by the ringing of the bell or the blowing of the whistle. Plaintiff had but a few moments prior thereto observed the track for a distance of one thousand feet to the east and no train was in sight. An obstruction then intervened until a moment or two before the attempt to cross the track was made. The court reiterates that under these circumstances it cannot be said, as matter of law, that plaintiff was negligent in being at the place she was when the attempt was made to cross in front of the train. If this train had not been traveling at an excessive rate of speed, the accident would not have occurred; for the wagon, with its occupants, would have safely crossed to the other side. It is not negligence per se in every case for a person to attempt to cross a railroad track in front of a moving train. The statement to that effect in Pepper v. Southern Pac. Co., 105 Cal. 389, 38 Pac. 974, must be read in view of the particular facts of that case. It depends largely upon the distance of the train from the crossing when the attempt is made, and likewise upon the rate of speed at which the train is traveling, and likewise upon the character of conveyance which the person is using. The law allows no one to race with death under such circumstances. At the same time, if this train had been traveling at the rate of sixty miles an hour, plaintiff would have been run down by it, even though it had been far distant when she made the attempt to cross the track. An attempt to cross a railroad track in front of a moving train one thousand feet distant from the crossing would not be declared negligence per se. This illustration is given to show that many elements of fact enter into the question of negligence per se in crossing railroad tracks in front of moving trains. Here the horse was within a few feet of the track. The train was approaching directly toward the parties, and, so approaching, necessarily it was difficult to determine the rate of speed at which it was traveling. It was one hundred and fifty feet distant, and the horse was afraid of the cars. Under these conditions the court is prepared to say that it was for the jury to pass upon the facts. This plaintiff and Mrs. Green, as disclosed by the evidence, realized the danger in crossing this track. In approaching the cross-

ing they appear to have done everything that any prudent person would do, unless it was to stop and listen at the point where a view of the track was obstructed. Yet, as matter of law, in view of the facts, the court will not say that they were guilty of contributory negligence in not so doing.

In its facts the case of Hecker v. Railroad Co. (Or.), 66 Pac. 270, is very similar to the case at bar, and the law as there declared is in full support of the conclusion to which the court has here arrived. Among other things, it is said: "Although it is negligence for a traveler not to look and listen for approaching trains before attempting to cross a railway track, the law does not undertake to determine whether he shall do so at any particular place or given distance from the crossing. It is only required that he shall look and listen at the time and place necessary in the exercise of ordinary care. And this is generally a question for the jury, under all the circumstances of the particular case; for, as said by the supreme court of New York: 'If, in case of an accident at a crossing, it appears that the person injured did look for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time when and where looking would have been of the most advantage. Many circumstances might be shown which could properly be considered by the jury in determining whether he exercised due and reasonable care in making his observations': Rodrian v. Railroad Co., 125 N. Y. 526, 26 N. E. 741." The court feels that no adequate results would follow from the labor required in here setting out a review in detail of the numberless cases from other jurisdictions cited by appellant wherein is found a discussion of the question of contributory negligence arising from crossing railroad tracks at public highways.

Under the general allegation of negligence the plaintiff was entitled to introduce in evidence the ordinance of the city of San Bernardino limiting the rate of speed of trains within the municipality to ten miles per hour, and also to prove by witnesses that at this time the defendant was violating the terms of that ordinance. The witness Kelly was competent to give his opinion as to the rate of speed the train was traveling: Johnson v. Oakland etc. Ry. Co., 127 Cal. 608, 60 Pac. 170.

Many exceptions are taken to the various instructions containing the law given to the jury, and likewise many exceptions are taken to the action of the court in refusing to give certain instructions and in modifying others asked to be given. The instruction given bearing upon the degree and character of care required to be used by defendant in operating its trains, when read as a whole, cannot be said to contain substantial error. The same situation is found as to the instruction defining the degree of care required by the law to be used by the plaintiff. Neither can the instructions be said to be contradictory upon the point that Mrs. Green's negligence was the plaintiff's negligence. The court has examined carefully all of the exceptions taken upon this branch of the case. Many of them are technical in the extreme, and none of them are sufficiently meritorious to demand a reversal of the judgment and a second trial.

In this case special issues were found by the jury, and also a general verdict returned. It is now claimed that there was no evidence to support certain of these issues; notably the finding of the jury that the horse of plaintiff was not under control immediately prior to the accident. Conceding that there is an absence of evidence to support this finding, still that fact does not necessitate a retrial of the cause. The general verdict has support in the evidence, and it is sufficient that the special findings are not in conflict with that verdict. There being no substantial conflict between the general verdict and the special findings, the general verdict will stand.

For the foregoing reasons the judgment and order are affirmed.

We concur: Harrison, J.; Van Dyke, J.

# GREEN et al. v. SOUTHERN CALIFORNIA RAILWAY COMPANY.*

L. A. No. 950; December 18, 1901.

67 Pac. 4.

**Death of Married Woman—Damages—Loss of Society.**—In an action for the death of a married woman, her husband and children were entitled to recover as damages all pecuniary loss suffered by them from the loss of society and protection of the deceased.[1]

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action for damages for death of Mary Green by F. L. Green and others against the Southern California Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

C. N. Sterry and Henry J. Stevens for appellant; J. P. Hight and L. M. Sprecher for respondents.

GAROUTTE, J.—This action is brought to recover damages for the death of Mary Green, who, in attempting to cross the railroad track in a wagon at C street, in the city of San Bernardino, was killed by a locomotive of defendant. Her mother, Mrs. Betsey Warren, who was with her at the time, was also injured in the accident. She brought an action for damages against defendant and recovered. An appeal was taken to this court, and the judgment and order denying a motion for a new trial affirmed: Warren v. South-

*For subsequent opinion in bank, see 138 Cal. 1, 70 Pac. 926.

1 Cited and followed in Mize v. Rocky Mountain Bell Telephone Co., 38 Mont. 535, 129 Am. St. Rep. 659, 100 Pac. 974, as construing a statute of California similar in all material respects to one of Montana on the subject of the measure of damages.

Cited and followed, along with cases from other states, in St. Louis & S. F. R. Co. v. Moore (Miss.), 58 South. 474, where the court says that, although the weight of authority, English and American, is against making the loss of the society, etc., of the deceased an element of damage, the principle rests in every case upon some statute excluding it.

ern Cal. Ry. Co. (L. A. 951; opinion filed this day), ante, p. 835, 67 Pac. 1. The facts are there fully set forth, and nearly all of the questions of law raised by this record are there decided. For that reason they will not be again discussed, but the legal principles laid down in that decision are hereby approved.

Complaint is made of the action of the court in declining to instruct the jury that it was the duty of Mrs. Green, under the facts of the case, to stop and listen for an approaching train. In certain cases the facts are so peculiar unto themselves that it may be said, as matter of law, a person should stop and listen before attempting to cross a railroad track. But the doctrine has not been given wide latitude in this state, and the facts must be exceptional to demand its application. This doctrine is exemplified by the text of the learned author upon whom appellant relies, where we find the following language: "As we have said, we do not think that it can justly be affirmed, as matter of law, that there is a duty to stop in all cases; but we do not think that the duty exists in cases where there is an obstruction to sight or hearing, and that, where the surroundings are such that but one conclusion can be reasonably drawn, and that conclusion is that it is negligence to proceed without halting, the court should without hesitation direct a verdict, if no halt is made. In the majority of cases, however, the question is one of fact, rather than of law": 3 Elliott on Railroads, pars. 1166, 1167. The facts of the case at bar were sufficient upon this point to justify the action of the court in refusing a nonsuit.

The instruction which stated that plaintiffs were entitled to recover as damages all pecuniary loss suffered by them from the loss of society, protection, etc., of the deceased, was properly given: Wales v. Pacific etc. Motor Co., 130 Cal. 521, 62 Pac. 932, 1120. In an action for damages brought by the father and children for the death of the wife and mother, for the purpose of fixing the amount of damages suffered, evidence will be allowed by the court to take a wide scope as to the habits, the health, the temperament, the intelligence, the education, the affection, etc., of the deceased; and in this case the trial court did not go beyond

the law in the character of examination allowed: Redfield v. Oakland etc. Ry. Co., 110 Cal. 277, 42 Pac. 822.

For the foregoing reasons the judgment and order are affirmed.

We concur: Harrison, J.; Van Dyke, J.

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## READ v. SAN DIEGO UNION CO. et al.

L. A. No. 947; December 21, 1901.

67 Pac. 1.

**Consecutive Appeals—Identical Facts—Dismissal.**—Pending appeal from an order denying defendant a change of venue, a demurrer to the complaint was sustained, and, after the complaint was amended, defendant again moved for change of venue, and appealed from the order denying the change. Held, that on determination of the first appeal the second presented merely a moot case, and would be dismissed.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by T. J. Read against the San Diego Union Company and others. From an order denying the motion for a change of venue defendant San Diego Union Company appeals. Dismissed.

Titus & Shaw for appellant; W. H. Shinn and Byron L. Oliver for respondents.

HAYNES, C.—This appeal is from an order denying appellant's motion to change the place of trial of said action from Los Angeles county, where it was brought to the county of San Diego, in which said corporation has its place of business. Two prior motions to change the place of trial had been made by the defendant corporation, and denied by the court below, and appeals were taken from each order. The first of these appeals (L. A. No. 884) was decided June 26, 1901, and the order was reversed, with directions to the court below to grant said motion (ante, p. 703, 65 Pac. 567). After the motion in No. 884 was denied by the superior court, the demurrer of the corporation to the complaint was heard and

sustained, and, an amended complaint having been filed, the corporation again moved the court for an order changing the place of trial, and upon the hearing the court denied the motion on the ground that it was a renewal of a motion previously made and denied; and it is from that order this appeal was taken. The former appeal having accomplished the change of venue, we see no purpose that can be subserved by a decision of the appeal now before us. It is now a moot case merely, so that, if it were conceded that the court erred in denying the motion on the ground that it was a renewal of a motion previously made and denied, a reversal would not aid the appellant. Under these circumstances the appeal should be dismissed at appellant's cost.

We concur: Gray, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the appeal is dismissed, at appellant's cost.

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## RUDDOCK CO. v. JOHNSON et al.

L. A. No. 998; January 28, 1902.

67 Pac. 680.

**Agency—Authority of Agent—Statute of Frauds—Evidence.**—In an action for damages for an alleged breach of a written contract to purchase peaches from plaintiff, the contract price being for more than $200, and the agent, who was claimed to have executed the contract for defendants, not having been authorized in writing, plaintiff contended that defendants were estopped to deny the agency, and to plead the statute of frauds, because of a holding out of the agent as such in previous similar transactions. The evidence showed that previous sales of fruit were made by plaintiff to other parties than defendants, and defendants' agent testified that he told plaintiff's agent that the fruit in question was for the same purpose as formerly. It was shown that defendants were the agents of certain fruit dealers, and that the agent whom it was claimed had bound them was their subagent to purchase fruit for defendants' principals. Held, that no estoppel was shown, ostensible authority as a subagent not conferring authority to bind defendants as principals.

**Evidence.—A Withdrawn Cross-complaint is not Admissible in evidence.**

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by the Ruddock Company against F. S. Johnson and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Anderson & Anderson for appellant; Clarence A. Miller for respondents.

GRAY, C.—Action for damages for breach of an agreement by defendants to purchase plaintiff's crop of peaches, estimated at twelve tons or more. The defendants had judgment, and this appeal is by plaintiff from an order denying its motion for a new trial.

Appellant attacks the finding of the court to the effect that no contract or agreement was entered into between plaintiff and defendants. It appears that the contract or agreement for the purchase of plaintiff's peaches was in writing, and for a price much in excess of $200. It was signed by defendants only by the hand of their alleged agent, Prince by name. The contract of sale, being for a price of more than $200, was within the statute of frauds, and it was therefore necessary that it should be in writing. It was also necessary to show that the authority of the agent executing the contract in the name of the defendants was also in writing, or else present facts in some way taking the case out of the statute of frauds. It seems to be conceded that Prince had no authority in writing to sign the contract for defendants. It is contended, however, on behalf of appellant, (1) that defendants by their acts were estopped to deny the agency of Prince, because they had held him out as their agent in previous similar transactions with plaintiff; (2) the contract was ratified by defendants.

As to the first contention, the evidence without conflict shows that the previous sales of fruit by plaintiff upon which the contention depends were made to Emerson and Hall, and not to these defendants, or either of them; and Prince testifies that he told plaintiff's agent, Vincent, that he was getting the fruit in the purchase and sale upon which this action is based for the same parties as formerly, and that samples must be sent east to them. If Prince is to

be believed (and the findings indicate that the trial court did believe him), then plaintiff had oral notice that Prince was not acting as defendants' agent in the alleged sale and purchase involved in this case. Therefore, so far as the sale is attempted to be established on the theory of the ostensible agency of Prince and the estoppel of the defendants, the finding against the sale finds support in this evidence that all the purchases were for the eastern house, and not for defendants, and that plaintiff had notice of that fact. The evidence tends to show that defendants were only the agents of fruit dealers in the east, and it cannot be reasonably contended that, defendants having sent Prince out as their subagent to purchase fruit for their principals in the east, they are estopped to deny his authority to make purchases that would bind them as principals. Ostensible authority for one purpose certainly does not confer authority for all purposes.

The claim of ratification of the contract is hardly worthy of consideration, for the reason that the letter and other acts of defendants relied on to show ratification seem rather to show the contrary. The letter written by Hall, purporting to have been on behalf of defendants, referred to the purchasers as "Emerson and Hall, of Minneapolis," and said that the samples submitted to them had not been approved, and "this cancels the contract." The withdrawn cross-complaint was not evidence of ratification, nor was it evidence at all; Ralphs v. Hensler, 114 Cal. 196, 45 Pac. 1062; Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076.

We think the evidence fails to show that the question of Prince's authority to execute the written contract of purchase for defendants was taken out of the statute of frauds, and that the evidence fails to sustain the theory of ratification. The finding of no contract must therefore be upheld. There being no contract, the plaintiff cannot recover in this action, in any event, and the other questions presented become immaterial.

We advise that the order appealed from be affirmed.

We concur: Haynes, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

# LAIDLAW v. PACIFIC BANK (McGOWAN, Intervener).*

S. F. No. 2491; February 15, 1902.

67 Pac. 897.

**Savings Banks—Power to Contract Debts.—Act of April 11, 1862,** section 10, providing that it shall be unlawful for a savings bank corporation or its directors to contract any debt or liability against the corporation for any purpose whatsoever, is to be construed in connection with the remainder of the act, which authorizes such corporation to purchase a lot and building for its business, and to employ and compensate help, and to incur other expenses, and in connection with the amendatory act of March 12, 1864, conferring on such corporations power to do a commercial banking business, buying bonds, securities, etc.; and hence the former act does not prevent the bank from incurring any liabilities whatsoever, but only those not authorized by the other legislation mentioned.

**Savings Bank.—Where There is a Finding in an Action Against** the bank by a creditor that a debt of the latter is for money expended by the creditor for the use and benefit of the bank and at its request, it will be presumed on appeal that the money was expended for purposes for which the bank could incur a liability.

**Savings Bank.—Where the Debt of a Creditor of a Bank is** for money expended for its benefit and at its request, it will not be heard, in an action by the creditor to recover the money, to deny liability on the ground that it could not legally be bound by a contract to pay.

**Savings Bank—Priority of Claims.—Act of April 11, 1862,** section 10, providing that the assets and stock of a savings bank shall be security to depositors who are not stockholders, does not give priority to the claim of a depositor who is not a stockholder over the claim of a creditor of the bank who is also a stockholder thereof.

APPEAL from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Charles E. Laidlaw against the Pacific Bank. Mathew McGowan intervened. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. D. Sawyer (J. M. Burnett of counsel) for appellant; James M. Allen and Isaac Frohman for respondent; Roger Johnson for intervener.

*For subsequent opinion in bank, see 137 Cal. 392, 70 Pac. 277.

COOPER, C.—Appeal from judgment on the judgment-roll. The findings show that the appellant was incorporated under the name of "Pacific Accumulation Loan Company" under an act of April 11, 1862, entitled "An act to provide for the formation of corporations for the accumulation and investment of funds and savings" (Stats. 1862, p. 199), and that subsequently, by authority of an act of the legislature, it changed its name to that of "Pacific Bank." That at all times it had a capital stock of $1,000,000, divided into ten thousand shares of the par value of $100 each, all of which was subscribed and fully paid for; and up to the twenty-third day of June, 1893, said corporation was engaged in the transaction of a general commercial banking business exclusively. That prior to said last-named day the said corporation became insolvent, and at the time it so became insolvent it had about nine hundred depositors, who were not stockholders, and to whom it was then indebted in the sum of about $1,400,000 on account of deposits made by such depositors with said corporation. On October 16, 1893, after due proceedings, the said corporation was adjudged insolvent, under the act of March 30, 1878, creating a board of bank commissioners, and was prohibited from the further transaction of business, and ever since has been in process of liquidation under said last-named act. That since said corporation went into liquidation it has paid dividends amounting to forty per cent on the unsecured claims of its depositors and other creditors, and the remaining assets are of sufficient value to enable it to pay forty per cent to plaintiff and intervener upon the claim involved in this action, provided no other creditor is paid. That on the twenty-second day of June, 1893, the said corporation became and was indebted to R. H. McDonald, who owned four thousand seven hundred and eighty shares of the capital stock of said corporation, "in the sum of $97,003, for moneys theretofore paid, laid out, and expended by said McDonald for the use and benefit of said defendant, at its request." That said claim was and remains unsecured, and defendant promised and agreed to repay the same on demand, and, although demand has been made, the same has not been paid, nor any part thereof. That prior to the commencement of this suit the said McDonald sold and assigned the said claim to plain-

tiff, who is now the owner thereof, subject to the rights of the intervener. That at no time since the eleventh day of March, 1886, did the by-laws of appellant provide that the same security should extend to deposits made by its stockholders as was and is given to depositors who are not stockholders of appellant by section 10 of said act of April 11, 1862. That prior to the commencement of this action and the assignment to plaintiff, Mathew McGowan, the intervener, commenced an action against R. H. McDonald, procured a writ of attachment, and had the same levied upon the said demand so due to said McDonald, which levy was in all respects regular. That said intervener afterward procured judgment in due form against said McDonald for the amount hereinafter named, which judgment has not been paid. As conclusions of law the court found that plaintiff and intervener are entitled to a judgment, directing appellant to pay them a dividend of forty per cent upon the indebtedness so due to plaintiff upon the assigned claim of said McDonald, amounting to $45,925.25, of which amount plaintiff is entitled to $8,423.58, and intervener to $37,501.67; and that plaintiff is entitled to a pro rata dividend with the other creditors, and depositors of any dividends that may hereafter be declared, after so paying plaintiff and intervener. Judgment was accordingly entered.

No question is made as to the amount of the judgment, or the division between plaintiff and intervener. It will therefore be wholly unnecessary to discuss any question as to the rights of the intervener for the reason that his rights are not questioned if the judgment entered is correct. It is claimed that the indebtedness found to be due plaintiff was and is ultra vires, and that the act of 1862 made the assets of the corporation preferred security to depositors who are not stockholders in the corporation. These two propositions we will discuss in the order named. The contention that appellant could not become indebted to McDonald is based upon a portion of section 10 of the act of April 11, 1862, which reads as follows: "And it shall not be lawful for the corporation, or the directors, to contract any debt or liability against the corporation for any purpose whatever." If literal and full effect is to be given to the words quoted, the corporation could not, under any circumstances, become legally indebted to anyone, or incur any liability of any

kind, for any purpose. Such an interpretation would create an irreconcilable conflict with various other provisions of the act, and would, in effect, prohibit the corporation from carrying on or conducting any business. The corporation could not, from the very nature of its organization, engage in any business, without incurring obligations. In receiving deposits it becomes the debtor of the depositor, and contracts a liability. Statutes must be construed so as to avoid conflict and absurd results, and to promote the objects of the legislature. It is the duty of courts to interpret statutes according to their true intent and meaning, collected from the whole, and every part thereof taken together. The intent, when so ascertained, must prevail, even over the literal sense of the terms, and control the strict letter of the law when the letter would lead to possible injustice, contradictions, and absurdity: Ex parte Ellis, 11 Cal. 224; People v. Craycroft, 111 Cal. 544, 44 Pac. 463. By an examination of the whole of the act of 1862 and the amendatory act of March 12, 1864 (Stats. 1863–64, p. 158), it is plain that the legislature intended that the corporations formed thereunder should have, and that they were given, power to incur all liabilities necessary to fulfill the objects and purposes thereof. A corporation formed under the act of 1862 is authorized, among other things, to purchase a lot and building in which to carry on business, to purchase necessary personal property, to employ competent persons to conduct its business and to compensate them for such services, to loan and invest the funds of the corporation and receive deposits of money, to repay such deposits with interest. It is provided in section 24 that upon application for dissolution the judge must be satisfied "that no indebtedness of the corporation exists, other than to depositors who have not demanded their deposits." It is therefore evident from reading the act that the legislature intended the corporation to contract or incur some debts and liabilities. The finding is that the moneys were expended for the use and benefit of the corporation. We must presume that such expenditures were for legitimate purposes, and for such as were authorized by the charter. The money may have been used in paying depositors to whom the corporation had "contracted a liability," or in paying rent of the building in which its business was conducted, or in paying wages of employees,

or overdrafts at other banks. If, under the act, there is any single thing for which the corporation may incur a liability for money paid out for its use, we must presume that such money was paid for such thing. The amendatory act of 1864 enlarged the powers of corporations formed under the act of 1862 so that they were authorized to do a commercial banking business as well as a savings bank business: Murphy v. Pacific Bank, 119 Cal. 339, 51 Pac. 317, 130 Cal. 542, 62 Pac. 1059. The court found that the appellant had been for more than twenty years last past engaged in the transaction of a general commercial banking business exclusively. The amendatory act of 1864 authorized the corporation to deal in or buy "bonds, securities, or evidences of indebtedness, public or private." This it could have done as a savings bank, in the absence of express power: Bank v. Barrett, 126 Cal. 413, 5 Pac. 914. If appellant's contention is correct, the money paid out for its use may have been for the purchase of bonds or evidences of indebtedness, and yet the corporation not be liable. Such an interpretation would be unreasonable, unjust and is not the law. It appears that the law of the state of Iowa in regard to savings banks provided: "That they shall not contract any debt except for deposits and the necessary expenses of managing and transacting their business." In discussing the above provision in Ubbinga v. Farmers' etc. Bank, 108 Iowa, 221, 78 N. W. 840, the court said: "Another provision of the same law expressly authorizes such a bank to 'discount, purchase, sell, and make loans on commercial paper, notes, bills of exchange, drafts, or any other personal or public securities.' . . . . It will be seen that the law authorizes the purchase of notes, and, if the bank has that power, it must have the right to make the agreement therefor; and it seems to us that it would be an unwarranted construction of the law to say that such an agreement might not be executory. Such a power would seem very essential in the ordinary transaction of business. It may be doubtful if the word 'debt' in the statute is intended to embrace more than an express obligation to pay money; but that we do not and need not decide. We are clearly of the opinion that the statute authorizing the purchase of notes gives the right to make the contract in question": See, further, Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 628; McKiernan v. Len-

zen, 56 Cal. 63; Ward v. Johnson, 95 Ill. 215. If we were to assume that the appellant could not under the language of section 10, herein quoted, make a valid contract binding it to pay McDonald the money so paid out to its use, it would not change the result. There is no claim of fraud in the transaction, and not even a suggestion of any such thing. The plaintiff's assignor in good faith paid his money for the use and benefit of appellant. It received the benefit of such payment, and has never repaid the amount. The appellant not only consented to but requested the payment. This is not an action to enforce an executory contract, but to recover the amount paid, the benefit of which the appellant has received. The appellant, having requested the payment of the money for its use and benefit, cannot now be heard to refuse payment upon the ground that it cannot legally be bound by a contract to pay. The principles of natural justice and common honesty demand that it shall be held liable for the money so paid to it or to its use: Morse, Banks, 3d ed., sec. 750; Seeley v. Lumber Co., 59 Cal. 23; Main v. Casserly, 67 Cal. 127, 7 Pac. 426; Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; Visalia etc. Light Co. v. Sims, 104 Cal. 332, 43 Am. St. Rep. 105, 37 Pac. 1042; Aldrich v. Bank, 176 U. S. 636, 44 L. Ed. 611, 20 Sup. Ct. Rep. 498.

It is claimed that under the latter clause of section 10 of the act of 1862 the assets of the corporation are security first to the depositors who are not stockholders, and that such depositors are to be paid in full before any payment shall be made to creditors. The portion of the section relied upon is as follows: "But the capital stock and the assets of the corporation shall be a security to depositors who are not stockholders, and the by-laws may provide that the same security shall extend to deposits made by stockholders." It is claimed that the cases of Murphy v. Pacific Bank, 119 Cal. 334, 51 Pac. 317, and same case, 130 Cal. 542, 62 Pac. 1059, support appellant's contention. We have examined those cases, and they simply hold, as the section reads, that, in the absence of any by-law, the assets of the corporation are to be applied first to the payment of depositors who are not stockholders in preference to those who are stockholders. The rights of creditors who are not stockholders was not an issue in said case on either appeal. But, although the question was not before the court for decision, the dicta in the

last appeal (130 Cal. 542, 62 Pac. 1059) clearly shows that the court was of the opinion that creditors who are not depositors should receive an equal pro rata with depositors who are not stockholders. The court said: "The controlling question of fact in the case is whether the said sum of $73,928.10 was loaned by said J. M. McDonald to the Pacific Bank, or whether it was a deposit. If it was a loan, the plaintiff was entitled to recover. If it was a deposit, he was not entitled to share in the dividends." While the opinion is not authority here, because the point was not involved, yet it is entitled to weight as showing the interpretation of the statute in the mind of the court. And we think the interpretation correct. There is nothing in the wording of the statute to show, or in any way indicate, that nonstockholding depositors should be preferred to general creditors. Unless such preference appears to have been in the mind of the legislature in passing the statute, we cannot infer such intent. Neither does it appear to us that any reason exists for such preference. The man who deposits $10,000 in the bank and the man who pays out to the use and benefit of the bank $10,000 are equally creditors. Each has parted with his coin upon the faith of the solvency of the bank. It is a hardship upon either to lose any part of the amount due him. Both being creditors of the same debtor, there is no reason why one should be preferred to the other. Equity would indicate that they be treated alike, and paid the same pro rata. In Fox's Appeal, 93 Pa. 406, it appears that the charter of the Kutztown Savings Bank provided "that for the security of the depositors the first trustees of the bank should provide a capital, which capital shall at all times be liable to the depositors for the amount of their deposit and the interest accruing thereon." The bank became insolvent, and on the distribution of the assets it was claimed that the depositors were entitled to the entire fund to the exclusion of all other creditors. The court held the position untenable, and in the opinion said: "The capital . . . . was evidently intended as a security for depositors, but not for them exclusively. It was designed to constitute a fund to be employed by the trustees for any of the legitimate purposes of the corporation. It might be loaned, or invested in property required for the use of the institution in conducting its business, or used in paying its creditors.

There is nothing in the charter to indicate that it was intended to be a special fund, separate and distinct from other funds of the institution, and for the exclusive benefit of depositors. . . . . We think that the depositors, as a class, had no exclusive right to the whole or any particular portion of the fund."

It is not necessary to discuss any other points in the case. We advise that the judgment be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

We dissent: Beatty, C. J.; Temple, J.; Harrison, J.

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## SALCIDO v. ROBERTS.*

Sac. No. 938; February 25, 1902.

67 Pac. 1077.

**Election—Ballots.—Writing a Name in the Wrong Column** does not invalidate the ballot as a whole, though the written name cannot be counted.[1]

**Election.—A Ballot Containing the Name of a Candidate Written** under the appropriate heading, but across the horizontal line between the title of the office and next below, or else below such line, is good.

**Election.—A Ballot Marked With a Cross Opposite the "Yes"** and "No" to proposed constitutional amendments is valid in other respects, and must be counted for the candidates properly voted for.

**Election.—A Mark on a Ballot Made by Folding** it before the ink on it had dried does not render the ballot void.

**Election.—A Ballot Containing the Written Words** "Blac Colu" in the blank column under the title "Justice of the Peace," together

*For subsequent opinion in bank, see 136 Cal. 670, 67 Pac. 431.

1 **Cited** and followed in Baldwin v. Wade, 50 Colo. 134, 114 Pac. 407, where it is held that the design of the voter, if it can be made out from the ballot as marked by him, is to be given effect, in the absence of statutory provisions to the contrary.

with a cross opposite the printed name of a candidate for that office, is valid in other respects, and must be counted for the candidates for other offices properly voted for, the court presuming that the voter intended to vote for a person named "Blac Colu."

**Election.—Under Political Code, Section 1211,** providing that, if a voter marks more names than there are persons to be elected to an office, his ballot shall not be counted for such office, a ballot so marked can be rejected only as to such office.

**Election.—A Mark Made Opposite a Name** by an instrument so full of ink as to practically make a round spot or blot instead of a cross, but in which the cross can be seen, is a sufficient mark.

APPEAL from Superior Court, Calaveras County; C. V. Gottschalk, Judge.

Action by J. Salcido against J. W. Roberts, contesting defendant's election to the office of supervisor. From a judgment for defendant, plaintiff appeals. Affirmed.

James A. Louttit, Ira H. Reed and F. H. Solinsky for appellant; Nichol, Orr & Nutter and J. P. Snyder for respondent.

COOPER, C.—At the general election held in November, 1900, respondent and appellant were each candidates for the office of supervisor of San Andreas township, in Calaveras county, being supervisor district No. 1. Upon the canvass of the returns, the board of supervisors certified that appellant had received 252, and respondent 250, votes, and officially declared appellant to have been elected. A certificate of election was accordingly issued, and respondent initiated this contest, under the provisions of the Code of Civil Procedure, for the purpose of having a recount. The court filed its findings and decision, declaring that appellant had only received 226, and respondent 228, legal votes, and thereupon adjudged respondent entitled to the office. This appeal is from the judgment, for the purpose of reviewing alleged errors in admitting or rejecting ballots. The questions discussed present some new phases as to the construction of the provisions of the Political Code relative to elections, and marking and counting ballots.

Section 1196, after providing various things as to the preparation of ballots, etc., says: "Nothing in this code con-

tained shall prevent any voter from writing upon his ballot the name of any person for whom he desires to vote for any office, and such vote shall be counted the same as if printed upon the ballot and marked as voted for." Section 1197 prescribes the form of the ballot, with different columns under different headings, as follows:

| Republican Ticket. | Democratic Ticket. | Prohibition Ticket. | Social Labor Ticket. | Blank Column. |
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It is further provided that each political party and independent nominations shall be entitled to a column on the ticket, the columns to be separated by broad solid printed lines, the number to exceed by one the number of separate tickets of candidates to be voted for at the polling place for which the ballot is provided. In the column headed "Blank Column," and under the heading, are the words, "The elector may write in the column below, under the title of the office, the name of any person, whose name is not printed upon the ballot, for whom he desires to vote." The code says such words shall be printed under the heading in the blank column. Section 1205 provides: "He shall prepare his ballot by making a cross after the name of a person or persons for whom he intends to vote, or by writing a name or names in the blank column." Section 1211: "(1) In canvassing the votes any ballot which is not made as provided in this act shall be void, and shall not be counted, but each ballot must be preserved and returned with the other ballots. Any name written upon a ballot shall be counted for the office under which it is written, provided it is written in the blank column. (2) If a voter mark more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office." Section 1215: "No voter shall place any mark upon his ballot by which it may be after-

ward identified as the one voted by him." The courts, in the interpretation of the statute, cannot confine themselves to the sole question as to the intention of the voter. The voter might, with the stamp, place a legal mark upon a ballot, and in a legal place, with the evident intention of marking the ballot for identification, but the ballot cannot for this reason be rejected. But, if he place an illegal mark upon the ballot, it must be rejected: Tebbe v. Smith, 108 Cal. 107, 49 Am. St. Rep. 68, 29 L. R. A. 673, 41 Pac. 454. The controlling object of the legislature in adopting the Australian ballot law was to secure an absolutely secret ballot, to the end that each elector may fully express his choice of the candidates to be voted for, uninfluenced by threats or intimidation, and that corruption at the polls may be prevented. Every positive requirement of the statute which, if disobeyed, would defeat its object, must be held mandatory: Tebbe v. Smith, supra; Lauer v. Estes, 120 Cal. 653, 53 Pac. 262. But such minor provisions as do not have that effect should be treated as directory, and a failure of the elector to comply strictly therewith should not be held to invalidate the vote, if the object and spirit of the law is not violated. It is with reluctance that the court will disfranchise the voter, by rejecting his ballot for a purely technical and unintentional violation of some minor detail. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor: Tebbe v. Smith, supra; Bowers v. Smith, 111 Mo. 45, 33 Am. St. Rep. 491, 16 L. R. A. 754, 20 S. W. 101. And every mark upon a ballot which might possibly be used as an identification does not necessarily demand that the ballot be rejected: Day v. Dunning, 127 Cal. 56, 59 Pac. 196.

There were eight ballots received and counted for respondent, numbered 17, 21, 30, 48, 53, 56, 72, and 80, which it is claimed should have been rejected. Five of these ballots had, part of them, the name "J. J. Halley," and part "J. Halley" written in lead pencil in the marginal space at the bottom of the left-hand column, under the heading "Republican ticket." Two of them had the name, likewise, written in a similar place, at the bottom of the column headed "Prohibition ticket," and one in like place at the bottom of the column headed "Democratic ticket." In each of the columns so headed, between horizontal lines, were

the names of the various candidates for presidential electors, representatives in Congress, member of assembly, district attorney, supervisor district No. 1, where such nominations had been made, and above the lower horizontal line, and above the margin in the several columns in which the names were so written, was printed, "For Justice of Peace—Unexpired Term. San Andreas Township. No Nomination," except under the column headed "Democratic ticket," in which the printed name of P. H. Kean was given as the nominee for justice of the peace. It is evident that in each instance the voter intended to vote for "Halley" for justice of the peace. A justice of the peace of San Andreas township was one of the officers to be voted for, as plainly stated in each ballot. The tickets each contain a column headed "Blank Column," and immediately under this heading is printed, as directed by statute, the titles of the various offices, and at the bottom of the column is printed the title of justice, thus:

| For Justice of Peace—Unexpired Term. San Andreas Township. |
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| |

Under the above title was the proper place to have written the name of the justice for whom the voter desired to cast his ballot. The voter in each instance wrote the name, as he was authorized to do under section 1196. He wrote it under the title of the office in a blank space, but not in the proper space in the blank column. There is not the slightest reason to believe that the name was written with any other intention than to vote for Halley for justice of the peace. It is such a mistake as might easily have been made by anyone using these ballots. The statute expressly provides that any ballot not made as provided for in the act shall be void, with two exceptions: "(1) Any name written upon a ballot shall be counted for the office under which it is written, provided it is written in the blank column," and "(2) if a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office": Pol.

Code, sec. 1211. The statute nowhere says that writing a name in the wrong column shall invalidate the ballot, but the plain inference of the special provision is that the written name shall not be counted unless written in the blank column. This is, in substance, to say that the ballot shall be counted for all other officers who are properly voted for. This has been expressly so held as to the second subdivision, where a voter marks more names than there are candidates for an office. It was held that the result was the ballot should not be counted for such office, but should be for all other purposes: Day v. Dunning, 127 Cal. 56, 59 Pac. 196. The same ruling was made in Attorney General v. Glaser, 102 Mich. 401, 61 N. W. 648, 64 N. W. 828. The conclusion herein reached is sustained by the supreme court of Oregon in the late case of Van Winkle v. Crabtree, 34 Or. 477, 55 Pac. 831, 56 Pac. 74. The provision in the Oregon statute, as to a blank column, is somewhat similar to ours. The voter had written the name of one Bradley for constable in the wrong space. The court said: "It is possible that the name so written might afford the means of identifying the person who cast the ballot; but since the elector had the right to express his preference by writing on the ballot the name of the candidate of his choice for the office of constable, we cannot think that his vote should be rendered void because it was written three-sixteenths of an inch above the line set apart for that purpose." We do not think it would be in accord with the reason and spirit of the law to hold that because the voters, although writing the name of Halley for justice under the proper title, wrote it in the wrong space, the consequence must be to declare the entire ballots void. We hold, as the statute declares, that they simply could not have been counted for justice of the peace.

Ballot No. 18, under the appropriate heading under the title of justice of the peace, had the name "J. J. Halley" written across the horizontal line between the title, and not wholly in the blank space above the line, and ballots 15, 27 and 37 contained the same name written in the proper column under the proper title, but below the line. The voter "wrote the name in the blank column," and substantially complied with section 1205. The law does not require the line below the title of the office, and it was in a legal place. These ballots were properly counted for respondent.

Ballots Nos. 49, 33a, 36, and 52 were properly counted for respondent. No. 49 was stamped with a cross opposite "Yes" and also opposite "No" to every proposed constitutional amendment, except the last one at the bottom of the ballot. No. 33a was likewise stamped opposite three of the proposed amendments. No. 36 was likewise stamped opposite one, and No. 52 opposite every, proposed amendment. The only consequence of voting "Yes" and "No" on these several amendments was that the ballot could not have been counted either for or against the amendment. It did not render the ballot void in other respects: Day v. Dunning, supra.

Ballot No. 4 was properly counted for respondent. The cross in the upper left-hand corner was clearly made by folding the ballot before the ink had dried on the cross in the upper right-hand corner.

Ballot No. 7 was properly counted for respondent. The dim cross on the right of the ballot in the space in which senate amendment No. 4 is printed was made by the ink being heavy on the opposite cross, and the ballot being folded before the ink had dried.

Ballot No. 45 was properly counted for respondent. In the "Blank Column" under the title of justice of the peace is written in pencil below the line "Blac Colu." The voter stamped a cross on this ballot opposite the Democratic nominee for justice of the peace. In the absence of evidence, we cannot say that "Blac Colu" was not the name of a person, and that the voter intended to vote for him for justice of the peace. The result is that, within the rule of Day v. Dunning, the ballot could not be counted for justice of the peace.

Ballot No. 55, counted for respondent, should have been rejected. It contained a cross stamped opposite the name of respondent in the proper place. It also contained the name "J. J. Halley" written in the blank column under the heading "For Supervisor, District No. 1." It cannot be said for which party the voter intended to vote, and hence the vote must be rejected: Pol. Code, sec. 1211.

Ballot No. 70 was properly counted for respondent. The instrument with which it was attempted to make the cross opposite the name of respondent was too full of ink, and thus made practically a round spot or blot instead of a

cross. But the ink is the same, and the size the same, as the various other crosses made by this voter. Several of the crosses on this ballot are almost round spots of ink, but in all of them the cross can be seen. It can be plainly seen in the blur complained of. This disposes of all the errors complained of by appellant.

As the respondent, after the rejection of ballot 55, still has one majority, it is not necessary to consider respondent's objections to ballots counted for appellant.

The judgment should be affirmed.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

## THOMASON et al. v. RICHARDS.

S. F. No. 2760; February 27, 1902.

67 Pac. 1056.

**Street Improvements.—In an Action to Recover on a Paving Contract,** where plaintiff had read in evidence a written contract, under the terms of which plaintiff agreed to pave the street in front of defendant's premises to the satisfaction of the superintendent of streets, a resolution of the board of supervisors stating that the work had been constructed to the satisfaction of the superintendent, and accepting the same, was competent evidence.

**Street Improvement.—Evidence as to the Character of Concrete** work in the street after the date when the work had been accepted by the street superintendent was incompetent, especially when there was nothing to show that it related to any of the work for which plaintiff sought to recover.

APPEAL from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by E. R. Thomason and others against G. H. Richards. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

D. H. Whittemore for appellant; J. C. Bates for respondents.

COOPER, C.—Action to recover upon a contract for certain work in paving the public street in front of defendant's premises. Findings were filed, upon which judgment was entered for plaintiffs as prayed. The findings are not questioned, nor is it claimed that the judgment is not the legal conclusion from the facts found.

Plaintiffs offered and read in evidence, without objection, a written contract, under the terms of which the plaintiffs agreed to pave the public street in front of defendant's premises "to the satisfaction of the superintendent of public streets, highways and squares of the said city and county." Plaintiffs then offered in evidence a resolution of the board of supervisors of the city declaring and stating that the work had been constructed to the satisfaction of the superintendent of streets, and accepting the same. To this offer defendant objected upon the ground that it was irrelevant, immaterial and incompetent, and it is now claimed that the ruling of the court admitting the resolution was erroneous. We think the resolution was not subject to the objections made to it. It was a part of the contract that the work should be done to the satisfaction of the superintendent of streets. The resolution was passed by the body charged under the law with the duty of supervising the work upon the public streets. The superintendent of streets testified that in January, 1893, he approved the work, and authorized his deputy to make a certificate. This evidence was not contradicted, and showed a compliance with the terms of the contract, regardless of the resolution of the board. It is urged that the resolution could not support a cause of action commenced two years before it was passed. But no such objection was made to it, and, besides, the main point, that the work was approved by the superintendent, was proven by evidence free from objection.

After plaintiffs rested, the defendant called one Turpin as a witness and asked him the following question: "Q. What was the character of that concrete work which you saw taken out of the street in 1894?" The objection to this question was properly sustained. It was not competent. It related to a date after the work had been accepted by the street

superintendent, and there was nothing to show that it related to any of the work for which plaintiffs seek to recover in this action.

The judgment should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## DAVIDSON v. LAUGHLIN.*

L. A. No. 949; March 5, 1902.

68 Pac. 101.

**Work and Labor.—In an Action for Services Rendered in Supervising** the construction of a building, evidence examined, and held not to show that plaintiff's agreement to work for $60 per month prior to the completion of the building, and until the tenants began to pay rent, was conditioned on his permanent employment by defendant thereafter at $150 per month.

**Work and Labor—Agreement for Permanent Employment.**—Under Civil Code, section 1999, providing that an employment having no specified term may be terminated at the will of either party on notice to the other, except where otherwise provided by law, an agreement to give a party "permanent" employment may be terminated at any time.

APPEAL from Superior Court, Los Angeles County; J. W. Mahon, Judge.

Action by A. N. Davidson against Homer Laughlin. Judgment for plaintiff and defendant appeals. Reversed.

Russ Avery and Bicknell, Gibson & Trask for appellant; J. S. Chapman for respondent.

VAN DYKE, J.—The action was brought as upon a quantum meruit for services rendered by the plaintiff to the

*For subsequent opinion in bank, see 138 Cal. 320, 5 L. R. A., N. S., 579, 71 Pac. 345.

defendant at his request in negotiating the exchange and purchase of certain real estate in the city of Los Angeles, supervising the construction of the six-story brick building erected by defendant in said city, and in hiring and discharging laborers, paying bills, and acting generally as the agent of said defendant, between the first day of October, 1896, and the twenty-sixth day of July, 1898; and it is alleged that said services were reasonably worth the sum of $3,550, and that only $500 of the same had been paid. In the second count of the complaint it is alleged that after the said plaintiff had been in the employ of the defendant for some time, and while the said six-story building was in process of construction, in consideration of the defendant's promising to employ the plaintiff permanently as the agent of said defendant in the management of said building, and collecting the rents and attending to the repairs thereof, the plaintiff agreed to accept the sum of $60 per month for his services prior to the time that the tenants of the building began to pay rent, and that after such tenants began to pay rent he would accept permanent employment at the rate of $150 per month; and it is further alleged that the tenants did begin to pay rent for portions of the building the 1st of July, 1898, but that defendant did not perform his agreement and employ the plaintiff permanently in the management of said building as the agent of defendant, but, on the contrary, without any cause or excuse whatever, on the twenty-fifth day of July, 1898, discharged the plaintiff and refused to permit him to perform any services as the agent of said defendant in the management or control of said business, and that the plaintiff was damaged by the nonperformance of said contract by the defendant in the sum of $3,050. After certain denials, the defendant sets up in his answer that the plaintiff and defendant entered into an express contract on the twentieth day of June, 1897, whereby the defendant agreed that, in consideration of the plaintiff giving at least three-fourths of his time in the performance of any services defendant might require, the defendant would give the plaintiff the sum of $60 per month from the first day of May, 1897, until the said six-story building should be erected and finished, and that after its completion the defendant would pay plaintiff at the rate of $150 per month until the defendant should take entire charge of the building. The court

finds that the services rendered by the plaintiff up to the first day of May, 1897, were paid by the defendant, and that the reasonable value of the services of the plaintiff for the defendant in and about the matters alleged in the complaint from the first day of May, 1897, to and including said twenty-fifth day of July, 1898, is the sum of $150 per month, amounting in the aggregate to $2,225, $500 of which had been paid, leaving a balance of $1,725, for which judgment was rendered in favor of the plaintiff. The court also found that the plaintiff, in consideration of the defendant's promising and agreeing to employ him permanently as his agent in the management of said building, at the rate of $150 per month, after the tenants of said building began to pay rent, agreed to accept the sum of $60 per month for services for the defendant up to the time the tenants began to pay rent. The court also finds that the tenants began to pay rent on the twelfth day of July, 1898, but that said defendant did not perform his agreement to employ the plaintiff permanently in the management of said building, but, on the contrary, on the twenty-fifth day of July, 1898, without any reasonable or lawful cause or excuse whatever, discharged plaintiff from his employment. The appeal is from the judgment and from the order denying defendant's motion for a new trial. The main points relied upon by appellant are that the findings are not supported by the evidence, and that the decision is against law.

1. The evidence bearing upon the agreement referred to between the plaintiff and defendant in reference to the services of the plaintiff consists of the testimony of plaintiff and defendant themselves. The plaintiff testifies on that point that about the 1st of June, 1897, before the building was completed, the defendant was in Los Angeles, but was about to return east to attend to his business there, and says: "So I met him down there, and asked him what arrangements he had made for paying contracts that would become due while he was away. The reason I asked him that was that he had spoke of going to the First National Bank and making arrangements, but he had not been there, and he handed me a letter addressed to the First National Bank, and said that would fix it. He hadn't had time to go down there. And I said to him, 'What do you want me to do, Mr. Laughlin?' 'Well,' he said, 'I want you to look after

the paying of the bills, and such things as that.' He said, 'I have hired Mr. Parkinson, and have made arrangements with Mr. Parkinson as architect, and Mr. Parkinson has agreed to furnish a superintendent, and sometimes there will be very little for you to do—probably not more than a half or three-quarters of your time; and what are you going to charge me for your services?' I said, 'Mr. Laughlin, that would be conditional; that is, if you want me to take charge of the building after it is finished, I will do it cheaper than I would if you were going to be here and take charge of it yourself.' He said he could not be here not to exceed half of the time, that he had his eastern business to look after, and that he would want a responsible man to look after his property in Los Angeles after it was finished, and wanted to know what I would charge. I told him I would charge $150 a month for looking after his property after it commenced to take in rent. He said that was satisfactory, 'and what will you charge me until that time?' Mr. Laughlin went on to say that he was out—that it would be all outlay and no income, and that he was under a great deal of expense, and, as I would have very little to do for a great deal of the time, that to make it reasonable; and I said, 'In consideration that you hire me for your agent after the building is completed, you can state your own price. Whatever is satisfactory to you is satisfactory to me.' And he said, 'No; I would rather you would name the price.' I says, 'All right. Make it $75'—$75 per month. He said that was satisfactory, and the $150 per month was satisfactory. And then he counted up, apparently from that time, to see how long it would take before the building would be finished, and he estimated ten months. That was longer than the contracts run, but we thought it would be later, and he said, 'Well, suppose we call it $600, or $60 a month.' I says, 'All right, and, in consideration that I have the agency of the building at $150 per month, that is perfectly satisfactory to me.' That is the last we ever said about those things. We talked about other matters—what we should do—and I went on and acted on that." The defendant's testimony is, in substance, as follows: "A little before I left for the train, Mr. Davidson came down with his buggy that evening to take me to the station, and there was a good many details talked there on the eve of my going, and I said: 'How much of a salary,

now, for assisting in this matter, Mr. Davidson? You know that I have employed Mr. Parkinson. He is the architect. We have a superintendent of construction, but I want a little beyond that. I want something a little beyond that—that when I happen to be away that we can look a little more closely than is looked into buildings generally. There may be some little bills to look after, some accounts to take, and so forth; and how much salary do you want a month?' 'Well,' he said, 'it ought to be worth $75 a month.' I replied, 'Mr. Davidson, I don't think it is worth $75 a month for all that is to do.' 'Well,' he said, 'how much do you think it ought to be?' I said: 'Mr. Davidson, I won't fix the price. I would rather you would fix your own price, and be satisfied with it, if you go into this business'—and stated at the same time that during the construction of the building for a long time there wouldn't be any income from the building, and that after the building was filled there would be something to get salary from; and he said, 'How would $50 or $60 a month be?' 'Well,' I said, 'we will let it go at $60; and, while there has been very little done previous to date that you have had anything to do, yet the first of our work runs back to the 1st of May, and we will call it from the 1st of May to the completion of the building'—the 1st of May, 1897. It was only a month or so we go back; and that is something that Mr. Davidson has overlooked, as he stated his wages were to begin on the day we talked; but it was to go back to that date, and he was to get more than that. He was to get paid from the 1st of May up to the completion of the building at the rate of $60 a month. 'Well,' he says, 'how about after the building is built?' 'Now, Mr. Davidson,' I says, 'that is a thing I don't know anything about, hardly. My environment in Ohio is such that it may be quite a while before I can dispose of my house. I may come here in a few months with my family, and it may take two or three years.' 'Well,' he says, 'can I have the building after it is completed?' 'Mr. Davidson,' I says, 'I have got to get somebody, and, for the moment, I don't know anybody better than you, and I can't see why I should get anybody else.' 'Well,' he says, 'if you feel that way, I will accept the $60 a month until it is completed.' 'Now,' I said, 'Mr. Davidson, I don't know. This is a thing we don't know. If I am a nonresident, and not here, it is worth $150

a month for a man to assume the whole responsibility and take charge of that; it is worth all you ask; and I don't know anybody better than you are to do the business; but I won't bind myself, because I don't know what will happen.' Times then were a little dull. It was most difficult to sell property, and I had a most expensive residence in East Liverpool, Ohio, that I wanted to dispose of, and they are slow sale anywhere; and I had at that time owned the entire factory myself, and I had other interests there that were not simply money interests—interests that took my personal time, and as long as that held it would require my son and me both. 'But we will let that take care of itself when we get to it. I don't know anything about it. If I don't come here, and everything goes smoothly, I can't see anything in the way of your continuing, after the building opens and we begin to get rent, at $150 a month.' He said: 'That is all right. I know men may die and things may change. We can't tell. We can't have permanent employment—absolutely permanent.'" The services of the plaintiff prior to the first day of May, 1897, according to the findings of the court, were fully paid and settled, and it is not necessary to consider that part of the claim. From that time and during the construction of the building, in view of the fact that only one-half or three-fourths of the time of the plaintiff would be required, it seems to have been agreed that he should have the sum of $60 per month. It is very clear from the testimony of the plaintiff and defendant—and that is all there is bearing upon the contract between the two parties—that there was no fixed and definite agreement in reference to the term of employment after the building should be completed and tenants commenced to pay rent, and it does not support the theory of the respondent that the agreement to pay $60 per month prior to the completion of the building was conditioned upon the permanent employment with the defendant thereafter at $150 per month. The plaintiff testifies: "In consideration that you hire me for your agent after the building is completed, you can set your own price. What is satisfactory to you is satisfactory to me." The defendant, according to the plaintiff himself, did not agree to that proposition, but replied: "No; I would rather you would name the price." Then he went on to state that during the construction of the building there would be very little for the plaintiff to do; that it

would not occupy more than half or three-fourths of his time; and under such circumstances they agreed to call it $60 a month for that period. As to an arrangement after the building should be completed, from the testimony itself given by the respondent, it appears that it depended upon contingencies. "He said he could not be here to exceed half the time, that he had his eastern business to look after, and that he would want a responsible man to look after his property in Los Angeles after it was finished"; implying from the whole of the testimony that when he or his son, as a substitute, should be here to look after the property, he would not require an agent. The plaintiff himself does not testify that the employment after the completion of the building should be permanent, although the court find such to be the fact. But even if the agreement should have been for permanent employment, as claimed by plaintiff and found by the court, this would not mean employment during life or as long as the plaintiff might desire, but it simply means for an indefinite term; and an employment having no specified term may terminate at the will of either party, on notice to the other: Civ. Code, sec. 1999. The agreement for the $60 a month, however, was for an ascertained, definite period (that is during the construction of the building and until tenants commenced to pay rent), and this was an independent and distinct agreement; and, owing to the fact that only half or three-fourths of the plaintiff's time was required, the compensation agreed upon would seem to be reasonable, without regard to future contingencies. About the time the building was completed, defendant, by power of attorney, appointed his son, who was then in Los Angeles, as his agent in the management of his business there while he was detained in the east. A controversy or quarrel soon arose between Laughlin, Jr., and the plaintiff about the management of the building, in reference to which the latter testifies: "I could not say just what I said to him, but I probably gave him to understand that I never had considered he was in charge of the building. Mr. Laughlin never had told me that he would be in charge. The fact is, Mr. Laughlin went away, I supposed, leaving me in charge of the building. He left about the 9th or 10th of July, and my recollection is that the power of attorney was made on the evening of the 9th of July, and up to that time Mr. Laughlin, Sr., had not said anything

about any changes in his relations with reference to the building." The finding that the plaintiff was discharged by the defendant without any reasonable or lawful cause or excuse is not supported by the evidence.

2. Even if the terms of the agreement had been that the employment, from the time tenants began to pay rent, should be "permanent," that would not, as a matter of law, have deprived either party of the right to terminate the employment at any time: Civ. Code, sec. 1999. "Permanent employment," as defined by Bouvier, means "employment for an indefinite time, which may be severed by either party": Law Dict., tit. "Permanent Employment." In Lord v. Goldberg, 81 Cal. 596, 15 Am. St. Rep. 82, 22 Pac. 1126, the plaintiff entered the defendant's employment as solicitor for customers for groceries, at a salary of $20 per week. The salary was to increase in proportion to the new business brought in. The plaintiff hesitated to accept the position unless assured that it would be permanent, and the defendant replied, "It will be permanent," and signed a written statement saying, "His position is permanent, so long as he desires to make it so." Plaintiff remained in the employment of the defendant five months, and, as his salary was greater than the increased profits of the business, defendant offered a lower scale, which plaintiff declined, and their relations were thereupon severed without further negotiations. This court, in passing upon the case, held that the finding of the court that he was wrongfully and without just or reasonable cause dismissed from the employment was not supported by the evidence, and adds: "But, however this may be, it is clear that plaintiff's employment was not intended to be for life, or for any fixed or certain period. It was to be 'permanent,' but that only meant that it was to continue indefinitely, and until one or the other of the parties should wish, for some good reason, to sever the relation." In Perry v. Wheeler, 12 Bush, 541, the plaintiff was elected permanent rector of a church, but was afterward, as he claimed, wrongfully dismissed. The court said: "Appellant, by his counsel, insists that he was the permanent rector of Grace church, and had the right to retain his position during life, unless he should become incapacitated for the performance of clerical duties by age or disease, or unless he should disqualify himself by immoral or unchristian conduct, or by the abandon-

ment of the faith and practices of the Protestant Episcopal church. He certainly was elected permanent rector, but we do not understand the term 'permanent,' as used in this case, to mean that the parties were to be bound together by ties to be dissolved only by mutual consent, or for sufficient legal or ecclesiastical reasons. We understand that Dr. Perry was called as the rector of the church for an indefinite period, and that it was intended he should continue to hold the place until one or the other of the contracting parties should desire to terminate the connection, in which case the dissatisfied party was to have the right to be relieved of further obligation to the other, upon fair and equitable terms, and after reasonable notice." In Elderton v. Emmens, 4 Com. B. 478, it was claimed that the plaintiff was retained and employed as a permanent attorney and solicitor of the defendant company, and had been wrongfully discharged. But it was held that the word "permanent," as used in the resolution of appointment, denoted no more than a general employment, as contradistinguished from an occasional or special employment. Therefore, if the agreement had been that the employment should be permanent after the tenants commenced paying rent, as claimed by appellant, it was subject in law to be terminated at the pleasure of either party; and the termination of the employment was not, therefore, a breach of the contract, and the decision of the court on this point is contrary to law.

The court finds that before the commencement of the action the defendant tendered to the plaintiff a sufficient sum, together with what had been previously paid him, to cover all the indebtedness due from defendant to plaintiff for services rendered after the first day of May, 1897, at the rate of $60 a month, up to the time the tenants commenced paying rent, and at the rate of $150 per month thereafter, and that subsequently the sum so tendered was paid into court.

For the foregoing reasons the judgment and order are reversed and the cause remanded, with directions to the court below to enter judgment in favor of the plaintiff for the sum so paid into court, but without costs.

We concur: Harrison, J.; Garoutte, J.

# SOUTHERN CALIFORNIA R. CO. v. SLAUSON.*

L. A. No. 916; March 7, 1902.

68 Pac. 107.

**Appeal—Notice—Time.**—An Appeal will be Dismissed where the notice thereof is not given within the statutory time.[1]

**Railroad—Adverse Possession.**—On an Issue Whether a Railroad has acquired title to land by adverse possession, evidence that the person whom it had authorized to obtain rights of way for its road had an interview with the land owner, at which the latter agreed that the railroad might enter the land and lay its tracks thereon, provided it put in a station, and that on such performance the owner would make a deed of the right of way, was admissible, although there was no written contract to show that the railroad entered the land under the owner's permission, and not hostilely.

**Railroad—Adverse Possession.**—A Railroad Company and a Land Owner agreed that, if the former would lay its tracks over the land, and put in a station, the owner would make a deed of the right of way; and thereafter the road was built and operated, but no station was built, nor did trains stop on the land. Held, that, the railroad having gone into possession under permission and in consonance with the owner's title, which it was not to have until the performance of conditions which had not been performed, the possession of the railroad was not adverse to the owner.[2]

**Quieting Title—Prescription—Findings.**—Where, in a suit to quiet title, plaintiff claimed title by prescription, and it was found that plaintiff had no title, the findings were not open to the criticism because of no express findings as to limitations, inasmuch as the finding of the ultimate fact as to the title included the whole controversy.

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*For subsequent opinion in bank, see 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. 352.

1 Cited and followed in Barton v. Riverside Water Co., 155 Cal. 515, 101 Pac. 792, 23 L. R. A., N. S., 331, as authority for the rule that after occupancy of land and user by the public for a long time, the owner standing by and offering no objection, although large expense has been gone into by the people in the premises to adapt themselves to resulting conditions, such owner cannot enjoin the further use and cannot recover the property, but is confined to an action for damages.

2 Cited by the court in Fountain v. Lewiston Nat. Bank, 11 Idaho, 468, 83 Pac. 509, and held not antagonistic to the proposition "that one who purchases a tract of land and pays the purchase price and enters into possession believing he has title—whether he receives a good deed of conveyance, an imperfect one or no deed at all—enters into possession adversely to the vendor and all the rest of the world."

**Quieting Title—Appeal.—Whether the Findings in a Suit** to quiet title sustain a judgment giving defendant restitution of possession cannot be examined on an appeal from an order denying a motion for a new trial.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Suit by the Southern California Railroad Company against J. S. Slauson. From a judgment for defendant, plaintiff appeals. Affirmed.

C. N. Sterry and Henry J. Stevens for appellant; Chas. Silent for respondent.

McFARLAND, J.—This is an action to quiet title. It is averred in the first count of the complaint that plaintiff is the owner and in possession of a described strip of land between thirty and forty feet wide and about thirteen hundred feet in length, and that defendant claims some title or interest therein which is without right; and the prayer is that it be decreed that plaintiff is the owner in fee simple of said land, and that its title thereto be quieted as against defendant. In a second count it is averred that for more than five years plaintiff and its predecessors in interest have been in the exclusive possession of a right of way over said land for the use and purpose of operating a railroad over the same, claiming to be the owner of said right of way adversely to any right, title, claim, etc., of defendant; and the prayer in this count is that the plaintiff's title to such right of way be quieted, etc., as against defendant. The judgment of the court below was in favor of defendant, and plaintiff appeals from an order denying its motion for a new trial. It also attempted to appeal from the judgment, but, as the notice of such appeal was not within the statutory time, the appeal from the judgment is dismissed. There are therefore before this court only such questions as can be considered on the appeal from the order denying a new trial.

The only title asserted by appellant is one based on prescription—appellant claiming that it had been in the adverse possession of the premises for more than five years before the commencement of the action. The court found against this asserted title by prescription, and the evidence was sufficient

to support the findings. During all the time mentioned in the complaint the respondent was the owner in fee of a tract of land which included the premises here in contest. There was evidence that when the predecessor of appellant—the Los Angeles and Santa Monica Railroad Company—contemplated building a road across the land, the person whom it authorized to obtain rights of way, etc., for such contemplated road had an interview with respondent, at which the latter agreed that the railroad company might go on and build the road over his said land, provided it would put a good depot on it, at which all passenger trains would stop; and that when that was done he would make a deed conveying the right of way. This evidence was clearly admissible, although there was no written contract to show that the railroad company entered upon the land by respondent's permission, and not hostilely. The result of the interview was reported to the company, and soon thereafter it began to build the road over the land, and, having completed it, it ran its trains over it. It continued to operate the road, but did not build the depot, nor stop its trains on respondent's land. It made no demand for a deed conveying the right of way, nor did respondent make a demand for the construction of the depot, until after five years had elapsed, when the present action was commenced by appellant. The court correctly found that appellant had no title. The railroad company having gone into possession under respondent's permission, and in consonance with the latter's title, which it was not to have until it should have performed the conditions named, the statute of limitations would not commence to run until the company had in some open way repudiated that title. This is elementary law, and we will simply refer to some authorities cited in respondent's brief: Farish v. Coon, 40 Cal. 33; Mauldin v. Cox, 67 Cal. 387, 7 Pac. 804; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Kirk v. Smith, 9 Wheat. 288, 6 L. Ed. 81; Wood, Lim., sec. 260.

Appellant contends that the findings are not full enough, because there is no express finding as to the statute of limitations and prescription. Assuming, without deciding, that this question can be raised on an appeal from an order denying a new trial, we do not think that this contention can be maintained. The whole question in the case was whether appellant had title. It based its only claim to title on pre-

scription, and the finding of the ultimate fact that it had no title necessarily included the whole controversy.

The respondent filed a cross-complaint in which he set up his ownership and prayed for judgment declaring him to be the owner in fee of the land in contest and restoring him to possession thereof, and the court rendered judgment in accordance with his prayer. Appellant contends that the part of the judgment giving respondent restitution of possession goes too far, and is, under any view, erroneous. It does not appear clear to us that, even if we could consider the question, we should hold that part of the judgment unwarranted. Appellant brought respondent into court, and asked that he present whatever claim of title he had, and have it adjudicated. The respondent appeared, and set up title in fee, and the court adjudicated that he had such title; and it is difficult to see why, under section 578 of the Code of Civil Procedure, the court did not have jurisdiction to "determine the ultimate rights of the parties on each side," which would include the right of respondent to possession of the premises in contest. It is doubtful if the case at bar could be brought within the declarations made in Railroad Co. v. Smith, 171 U. S. 260, 43 L. Ed. 157, 18 Sup. Ct. Rep. 794, supposing that they correctly state the law. However, this question cannot be here raised. There are, perhaps, differences of opinion as to the question whether, on an appeal from an order denying a new trial, the point can be considered that the court failed to find on some issue material to the decision, which was not necessarily disposed of in the other findings, and upon which evidence was introduced. But the clear result of the cases, from Knight v. Roche, 56 Cal. 15, down, is that the question now under consideration cannot be raised on this appeal. "Whether the findings sustain the judgment entered thereon can be examined only upon an appeal from the judgment": Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558. "The judgment itself can be reviewed only by a direct appeal taken after its entry": Brison v. Brison, 90 Cal. 323, 327, 27 Pac. 186. There are other cases to the same effect, and these cases do not conflict with Knight v. Roche, supra.

The order appealed from is affirmed.

We concur: Temple, J.; Henshaw, J.

## CROOKS v. CROOKS.

S. F. No. 2985; March 12, 1902.

68 Pac. 101.

**Appeal—Bill of Exceptions.—Where the Failure** to have a bill of exceptions, which an appellant has proposed to be used on an appeal, settled, was not caused by any fault or laches of such appellant, a motion to dismiss the appeal will not be granted.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Action by Samuel R. Crooks, guardian, against Annie T. Crooks. From a judgment for defendant, plaintiff appeals. Motion to dismiss appeal. Denied.

Sullivan & Sullivan and T. J. Roche for appellant; O. I. Wise for respondent.

TEMPLE, J.—It appearing that the appellant has proposed a bill of exceptions to be used on the appeal, and that said bill is not yet settled and certified, and that the failure to have such bill of exceptions settled was not caused by any laches or other fault of the appellant, the motion to dismiss is denied.

We concur: Beatty, C. J.; McFarland, J.; Harrison, J.; Garoutte, J.; Van Dyke, J.

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## ROUNTHWAITE v. ROUNTHWAITE.

L. A. No. 1150; March 17, 1902.

68 Pac. 304.

**Appeal.—Where the Evidence is Conflicting,** a finding will not be disturbed on appeal, though most of plaintiff's evidence is by depositions.

**Limitation of Actions—Acknowledgment.—In an Action for Money Loaned,** written acknowledgment of which is claimed to have

been made within four years, as required by Code of Civil Procedure, section 360, a finding that defendant did not acknowledge any indebtedness to plaintiff in writing is sustained, where the indebtedness claimed by plaintiff to have been acknowledged was of a debt due to her husband.[1]

**Limitation of Actions.—Defendant's Promise, if Made to Plaintiff,** being without any consideration, is unenforceable.

**Limitation of Actions—Acknowledgment.—Where an Account,** after it is barred by limitations, is sent to the debtor, with a blank indorsement, acknowledging its correctness and a promise to pay, which he declines to sign, his silence as to its correctness cannot remove the bar of Code of Civil Procedure, section 360, providing that no acknowledgment is sufficient evidence of a new contract, unless in writing and signed by the party charged.

**Limitation of Actions—Acknowledgment.—An Estoppel in Pais** cannot be urged as against the requirements of the code that the promise must be evidenced by writing to remove the bar.

APPEAL from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Margaret Rounthwaite against Samuel Rounthwaite. From a judgment in favor of defendant and an order denying a motion for a new trial plaintiff appeals. Affirmed.

Geo. A. Skinner for appellant; Purington & Adair for respondent.

CHIPMAN, C.—Plaintiff sues on three counts to recover for money alleged to have been loaned by plaintiff to defendant: (1) For money loaned by plaintiff to defendant more than four years before the commencement of the action, to wit, $1,000, at five per cent interest, which defendant has acknowledged in writing within four years, and alleging a payment of $300 in the year 1898, leaving due $850; (2) for the same amount, and that defendant promised in writing to pay plaintiff's claim within four years last past; (3) on an account stated June 15, 1899, showing a balance due plaintiff

[1] Cited with approval in President etc. of California College v. Stephens, 11 Cal. App. 517, 105 Pac. 615, where it is held that, to hold the debtor, the new promise, under section 360 of the Code of Civil Procedure, must be in writing and made to the person to whom the money is due; such a promise made to a stranger will not do.

of $871.14, and that defendant agreed to pay the same. Judgment is asked for $939.90, and interest at seven per cent from June 15, 1899. Defendant denies the indebtedness to plaintiff; denies ever acknowledging any indebtedness to plaintiff; denies that plaintiff ever loaned defendant any sum of money; pleads sections 337, 339 of the Code of Civil Procedure in bar; and alleges that any acknowledgment in writing given or signed by him to plaintiff, in relation to said indebtedness, was without consideration and void. The original complaint was filed September 15, 1900. The cause was tried by the court without a jury, and judgment passed for defendant. The appeal is from the judgment and from the order denying motion for new trial.

The court made the following findings: (1) That plaintiff did not loan to defendant, as alleged, or at any time, the sum named, or any other sum. (2) That plaintiff received from defendant $300 in 1898, but the same was not paid on any indebtedness owing by defendant to plaintiff, and it is not true that there was left a balance of $850, or any other sum due plaintiff. (3 and 4) That it is not true that defendant acknowledged said or any indebtedness to plaintiff, or promised plaintiff, in writing or otherwise, to pay the same. (5) It is not true that an account was stated between plaintiff and defendant June 15, 1899, or at any time; nor that a balance was found due plaintiff from defendant at that or any time of $817.14, or any other sum. It is true defendant has not paid said sum. (6) That plaintiff never at any time loaned defendant any money, at his request or otherwise, and, if plaintiff had loaned the sum of money claimed in the amended complaint, the cause of action is barred by section 337 of the Code of Civil Procedure. As conclusion of law, the court found that defendant is entitled to judgment for costs.

Defendant does not deny that a loan of £200 was made to him, but he claims that it was made by his brother, plaintiff's husband. Plaintiff claims that the evidence shows the loan to have been made by her, and therefore the first finding is not supported by the evidence. Upon this issue plaintiff claims that, although there may be a conflict in the evidence, yet, as most of the evidence submitted by her was in the form of depositions, this court is not bound by the usual rule; citing Wilson v. Cross, 33 Cal. 60. In the present case some

evidence of plaintiff was oral, and substantially all of defendant's was of that character: See Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Priest v. Brown, 100 Cal. 626, 35 Pac. 323; Knox v. Moses, 104 Cal. 502, 38 Pac. 318. In the first of these cases it was pointed out that the reason for the rule as to conflicting evidence is not alone because the lower court has a better opportunity to observe the conduct of the witnesses, but it lies also in "the essential distinction between the trial court and appellate court under our system," and the reason "grows out of considerations of jurisdiction; that it is the province of the trial court to decide questions of fact, and of the appellate court to decide questions of law"; and it was said, "This court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or the supporting evidence is so slight as to show abuse of discretion." It appears without conflict that the amount of the loan was £200; that the loan was made in Ireland in 1876, where the parties then lived; that it was for no stated time, and was to bear five per cent interest. The point of difference is only as to who loaned the money. Plaintiff deposed: That she loaned the money, and it was her own, and not her husband's, and was no part of his estate. He died in 1883 in Manitoba. That the loan was made by her trustees, and not by her personally, and she was not present when it was made. That she knows of no memorandum in writing of the loan taken by her trustees. Defendant testified: "I never had any business dealings with plaintiff at any time. I never borrowed from her the sum of two hundred pounds or any other sum; not five cents. In 1876 I was living in Ireland. I saw plaintiff and her husband that year at my place in Ireland. . . . . They came down to my place to spend the summer. Whilst my brother was at my place I had a business transaction with him. He loaned me two hundred pounds. . . . . When the loan was made there were present just my brother and myself. The plaintiff was not present." He was asked if he ever borrowed any money from plaintiff, and replied: "None whatever; not a cent." The evidence was uncontradicted that plaintiff paid the interest on the loan to his brother until the latter's death; that he died in December, 1883, in Manitoba, where they were both then living, and his estate has never been administered, and thereafter such pay-

ments as were made were at plaintiff's request. As to payments of interest, and the payment of $300 by defendant to plaintiff after her husband's death, defendant testified, "I thought she had the best right to it, as my brother was dead"; but he testified that he never had any conversation with plaintiff in regard to the loan. It is altogether probable that if plaintiff's money had been in the hands of trustees, and if the loan was made by them, some memorandum in writing would have been given by defendant, and payments of interest would have been made to them, or to plaintiff by their direction. However, there is a conflict in the evidence, and we cannot disturb the findings as to who made the loan. No time of payment having been stipulated, the obligation became due immediately (Civ. Code, sec. 1657), and, not being evidenced in writing, was barred after two years (Code Civ. Proc., sec. 339). In an amended complaint, probably to overcome the bar of the statute, plaintiff set up a claim on a stated account, and also on an alleged promise in writing to pay.

Appellant contends that findings marked 3 and 4, and so much of finding 6 as is in favor of defendant on the statutes of limitation, are unsupported by the evidence. She claims that the first two causes of action are based on section 360 of the Code of Civil Procedure, which reads: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title [relating to the time of commencing actions], unless the same is contained in some writing, signed by the party to be charged thereby." The difficulty we find in applying the evidence introduced to prove an acknowledgment or promise is that it all relates to an indebtedness which plaintiff assumes was originally created in her favor by defendant, whereas the court found that defendant never borrowed any money from her, and never was indebted to her, and that the indebtedness which she now claims was acknowledged, or which defendant promised he would pay to her, was a debt due to her husband. Section 360 refers to the acknowledgment or promise of the party charged by the original contract, to the person in whose favor the contract was made. It does not refer to the undertaking of one to answer the debt or default of another, and plaintiff does not claim that her action arises from such a promise. If, therefore, it be conceded that the

correspondence carried on between defendant and plaintiff and plaintiff's attorneys amounted to a promise or acknowledgment, there is no consideration to support such a promise or acknowledgment. Defendant has not denied that there is still an unpaid balance due on the loan, but he claims, and so testified, that he has never been indebted to plaintiff, and that he paid her $300 and some interest because he thought she had the best right to it. His letters show not only a willingness to pay her, but they show a promise that he will do so, but the element of consideration is wanting to make the promise enforceable.

As to the alleged account stated, it was prepared by plaintiff's attorney, and sent to defendant with a blank indorsement acknowledging its correctness and a promise to pay it. But defendant declined to sign the paper. This account was stated long after it was barred by the statute, and defendant's silence as to its correctness cannot be taken as may the silence of the debtor when served with a live stated account. An oral admission of an account stated which is barred does not remove the bar, because section 360, supra, stands in the way: Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Kahn v. Edwards, 75 Cal. 192, 7 Am. St. Rep. 141, 16 Pac. 779.

Appellant urges an estoppel by conduct against defendant. We fail to discover any elements of estoppel in the case; and, besides, an estoppel in pais cannot be urged as against the plain requirements of the statute that the promise must be evidenced by writing to remove the bar. Such proof thus becomes exclusive.

The judgment and order should be affirmed.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## PACIFIC IMP. CO. v. CARRIGER et al.*

S. F. No. 2920; March 18, 1902.

68 Pac. 315.

**Estoppel.—Evidence That a Subsequent Purchaser of Real Estate** acquired the legal title with knowledge of the claim of a prior purchaser, who had not obtained the legal title, but who acquired his interest in the lands from the same source of title, and that the prior purchaser had made improvements on the land, and that the subsequent purchaser allowed him to continue making such improvements, and to use the land for a period of eight or nine years, without notifying defendant of any claim to the land or warning her not to improve the same, is sufficient to estop the subsequent purchaser from recovering the property.

APPEAL from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Suit to recover real estate by the Pacific Improvement Company against Lizzie J. Carriger and others. From a judgment in favor of defendants, and from an order denying a new trial plaintiff appeals. Affirmed.

Platt & Bayne and J. E. Foulds for appellant; Lippitt & Lippitt for respondents.

CHIPMAN, C.—Plaintiff sues for the possession of certain lots in the town of El Verano, Sonoma county. The answer of defendants denied plaintiff's ownership, set forth certain facts from which it was claimed that the equitable ownership of the land was in defendant Lizzie J. Carriger, and also pleaded that plaintiff is estopped to claim title to the land. At the trial plaintiff dismissed the action as to all the defendants except Lizzie J. Carriger. The court found: (1) That at the commencement of the action plaintiff was the owner of the legal title to the lots in controversy. (2) That about December 21, 1888, Caleb C. Carriger and Lizzie J. Carriger, his wife, entered into an agreement with George H. Maxwell to sell to him their home place, adjoining the town of El Verano, and on April 30, 1889, Maxwell paid $500 on said contract.

*Rehearing denied April 17, 1902.

Thereafter, on May 25, 1889, the Sonoma Valley Improvement Company entered into an agreement and bond with the said Carrigers whereby the said company agreed to grant and convey to the said Carrigers, on or before December 31, 1890, the premises in dispute, free and clear of a certain mortgage executed by said Maxwell to Charlotte F. Clarke, and the Carrigers agreed that, if Maxwell should purchase the said Carriger ranch, according to the aforesaid agreement between Maxwell and the Carrigers, the latter would pay the said company $3,692 as payment in full for said lots, and this amount was to be deducted from the purchase price of the Carriger ranch; and the said agreement and bond of the said company further provided that, if Maxwell did not purchase the Carriger ranch, then the Carrigers should be entitled to a conveyance of the said lots without any charge whatsoever; and the agreement also provided that the Carrigers should be entitled to the immediate possession of said premises. (3) That the company put the Carrigers into the immediate possession of the premises, and they then and there so entered into possession, and they and their assignees and this defendant have ever since remained in the continuous, undisturbed, open and notorious possession of said premises under a claim of title to the same, and hostile to the title of plaintiff, and have made valuable improvements thereon; and defendant Lizzie was at the time of the commencement of the action in possession, she being the sole owner of all the right, title and interest in and to the said lots under said bonds and agreements. (4) That the Carrigers fully performed their contract with Maxwell, and at the expiration of the time therein provided they demanded that he cause, on behalf of the company, the necessary conveyances to be made to them of said premises, and he agreed to do so, but failed. (5) That in pursuance of said agreements with Maxwell the said company surveyed the lands of the Carriger ranch into town lots, and performed other labor on the land, and at an auction sale of land at El Verano offered for sale and actually disposed of portions of the said Carriger ranch, though no deeds were ever made therefor. (6) That at the time Maxwell and the Carrigers entered into the said bond and agreement Maxwell was acting in the interest of said company, of which he was the vice-president, and the duly authorized managing director; and after the

transfer of the property of the Sonoma Valley Improvement Company to plaintiff, the Pacific Improvement Company, he became and acted as the agent of the said Pacific Improvement Company. (7) That during the possession of defendant of said lots she paid taxes thereon for one year, and for the eight years preceding the commencement of the action the property was assessed to plaintiff as the owner thereof, and plaintiff paid the taxes so assessed, and during all said times plaintiff was the owner of the legal title to said premises. (8) That plaintiff during all the time of defendant's possession had knowledge of the agreement between Maxwell and the Sonoma Valley Improvement Company with the Carrigers, and through its (plaintiff's) officers, agents and employees had knowledge of the continuous possession of defendant of the said lots, and her claim of ownership under said agreements; and during all said time until August 3, 1899, the Sonoma Valley Improvement Company and plaintiff "did not, by word or deed, challenge the right of said defendant to the ownership of said lots, or notify her to vacate the said lots, or demand the possession of the said lots from her or her grantors, or in any manner or form claim or exercise any interest or ownership therein, except by the payment of taxes thereon." As conclusions of law the court found: (1) That defendant did not obtain title by adverse possession; (2) that plaintiff is estopped from denying defendant's title, or of setting up title in its behalf; (3) that defendant is entitled in equity to the ownership of the premises and to have her title quieted. Judgment was accordingly entered, from which, and from the order denying its motion for a new trial, plaintiff appeals.

Plaintiff challenges all the findings except the first and seventh as unsupported by the evidence, and confines the discussion by the single question of estoppel, claiming: First, that plaintiff is not estopped, because it is not bound by the agreement of May 25, 1889, there being no consideration for the promise of the Sonoma Valley Improvement Company to convey the El Verano lots to the Carrigers; second because the record discloses no elements of equitable estoppel; third, plaintiff was not guilty of such laches as would constitute ground of estoppel. On December 15, 1887, Maxwell and certain other persons entered into an agreement to organize one or more corporations to purchase certain land and sub-

divide it into town lots. One of these corporations was the Sonoma Valley Land Company. When this agreement was made, Maxwell represented that he had a contract to purchase the Clarke tract, mentioned in the findings, and it was agreed that this tract should become part of this syndicate's property. Maxwell made a payment of $10,000 to the owner, took a deed to the land in his own name, and gave his mortgage for $65,000 to secure the balance of the purchase price. This deed was dated May 4, 1888. On May 15, 1888, Maxwell formed the Sonoma Valley Improvement Company, and, in fraud of his syndicate associates, he deeded the Clarke tract to that company on May 16, 1888, and it went into possession, and on it laid out the town of El Verano. The transaction was fully exploited in a suit brought by one Bacon for the stockholders of the Sonoma Valley Land Company against the Sonoma Valley Improvement Company and others. On December 31, 1888, Maxwell entered into the agreement with the Carrigers for the purchase of their land, which joined the Clarke tract, and was also available for town lots. Maxwell was the vice-president of the Sonoma Valley Improvement Company, and its managing director, until May 27, 1890, and Chas. F. Crocker and F. S. Douty were directors in the company, and, defendant claims, were also directors of the plaintiff company. The Sonoma Valley Improvement Company exercised many acts of control over the Carriger land, some of which are mentioned in the findings; and on May 25, 1889, it agreed in writing with the Carrigers to sell them lots 3, 4, 5 and 6 of the Clarke tract, comprising eighteen acres, free and clear of the mortgage held by Mrs. Clarke, and the Carrigers went into immediate possession under the agreement, and made valuable improvements on the lots. The facts set forth in findings numbered 2 to 6, inclusive, omitting for the present the latter part of the finding 6, referring to plaintiff, are sustained by the evidence. There is evidence, in our opinion, warranting the finding that in the purchase of the Carriger tract Maxwell was acting for the Sonoma Valley Improvement Company, of which he was the vice-president and managing director, and that this company was interested in the land when it made the agreement with the Carrigers. They so understood it, as was testified; and the conduct and actions of the company, assuming direction and control of the Carriger land, though not dispossessing the

Carrigers, were calculated to confirm the Carrigers' understanding of the transaction. There was a modification of the Maxwell-Carriger contract of advantage to the company, as interested in the property, which defendant claims was a part of the consideration for the agreement of the company to sell the lots to the Carrigers. This was an extension of the time of payment, and was executed on the same day the company entered into the agreement and bond. But, aside from this circumstance, the written contract of the company recites that it is made "for a valuable consideration," and it is inconceivable that the company would have made such an agreement without it had an interest in the contract of sale which it regarded as of some value. If it was improvidently made, there is nothing to show that the company was without authority to make it, and it is no fault of defendant that it was not carried out. Maxwell and the company may have had some motive satisfactory to themselves for not having this agreement transferred to the company by some record, but all the circumstances indicate that it was in fact an agreement for the benefit of the company, and, if its minutes failed to show any assignment to it, or any ratification of the bond executed by the company, the fact does not compel the conclusion contended for by appellant.

Appellant claims that there is no evidence to support the finding of the court that, after the transfer of the property in dispute by the Sonoma Valley Improvement Company, Maxwell became and acted as the agent of the plaintiff (finding 6); and that during the time of defendant's possession plaintiff had knowledge of the Maxwell-Carriger agreement, and had knowledge of defendant's possession, and made no objection thereto, and asserted no claim to the land, and did not dispute defendant's title by any act, except to pay the taxes (finding 8). The evidence on this branch of the case is somewhat involved, and is circumstantial, rather than positive and direct, in its support of the inferences drawn by the court. Maxwell conveyed the Clarke land to the Sonoma Valley Improvement Company May 16, 1888; the Bacon suit was commenced June 4, 1888; lis pendens recorded June 6, 1888; decree of the trial court was entered October 8, 1890, and was affirmed here August 17, 1892. The decree directed was a conveyance by the Sonoma Valley Improvement Company of the Clarke land to the Sonoma Valley Land Com-

pany, the equitable owner of the land, on payment by the latter to the former, for the use of Maxwell, of $10,000, the payment made by him to the Clarkes; the conveyance to be subject to the Maxwell mortgage to Mrs. Clarke. It does not appear that the Sonoma Valley Improvement Company ever executed a deed as directed. But it appears that after the decree of the lower court was entered in the Bacon suit, and pending the appeal, the Pacific Improvement Company, plaintiff, purchased the outstanding titles to the property, and a deed was made to it by Bacon and other stockholders in the Sonoma Valley Land Company and the parties to the syndicate agreement with Maxwell, this deed being dated November 18, 1891, and recorded December 24, 1891, nine months before the Bacon judgment was affirmed. The Sonoma Valley Improvement Company, on the same day, also conveyed the Clarke land (including the lots in question) to the Pacific Improvement Company by deed dated November 18, 1891, recorded December 24, 1891; and it also made another deed to plaintiff, dated June 30, 1892, recorded September 1, 1892. This latter deed was executed a month and a half before the Bacon decree was affirmed, and it is not shown why it was made. It appears, therefore, that plaintiff became interested in the property as early as November, 1891, and, as these deeds must have been the result of business negotiations, plaintiff must have concerned itself about the property some time before. The Pacific Improvement Company had an agent at El Verano (one Riser) "since 1891," as he testified, and it was he who in 1899 served the notice of plaintiff on defendant to surrender possession. He testified that he received his orders "most of the time from Mr. Maxwell, he representing, as I understood, the Pacific Improvement Company." He testified that since August, 1898, he received all his orders directly from Pacific Improvement Company. "Previous to that time they came to me through Geo. H. Maxwell. My wages were paid by the plaintiff. Prior to my acting for the plaintiff, I served as agent for the Sonoma Valley Improvement Company, taking my orders from Mr. Maxwell. . . . . All the interests of the Sonoma Valley Improvement Company, as far as I know, were merged in the Pacific Improvement Company." The agreement and bond of the Sonoma Valley Improvement Company with the Carrigers to convey these lots was recorded April 30, 1889, and

was constructive notice of their claim upon the land. Maxwell knew of the possession of defendant and her predecessors of the land in controversy, and I knew it had been fenced by them, and an orchard planted on it; and Riser testified that he was never directed to make any claim on the land for the Pacific Improvement Company, or to notify the Carrigers to surrender possession, until 1899, when he served written notice. The knowledge of defendant's claim to the land by Riser and Maxwell must be held to be the knowledge of the Pacific Improvement Company, and it must be presumed that when the Pacific Improvement Company was negotiating for the purchase of the outstanding titles of the Clarke tract, and took deeds from defendant's grantor before it knew what the final outcome would be in this court, it took the title with notice of defendant's claim. It appears that the Sonoma Valley Improvement Company continued to make contracts for the sale of and made deeds to these Clarke lands, and there are in evidence deeds running along from December, 1891, to March, 1894, which were recognized and protected by the Pacific Improvement Company, and deeds of confirmation were made to the parties by this company. Counsel for plaintiff, Mr. Shay, made in open court a statement as follows: "After the decision in that case [Bacon v. Sonoma Land Co. et al.], the Pacific Improvement Company purchased the outstanding titles, and since that date all contracts and improvements have been made in the name of the Pacific Improvement Company. Where parties had made purchases of the lands or lots or blocks from the Sonoma Valley Improvement Company prior to the decision in the Bacon case, those purchases were all recognized by the Pacific Improvement Company; and, when deeds were made later, in each instance a double deed, you might say, was made—one by the Pacific Improvement Company, conveying the legal title then held by it; the other by the Sonoma Valley Improvement Company, conveying whatever title it might have, so as to give the purchaser clear title." No explanation is offered as to why this course was not pursued toward defendant, or some adjustment of the conflicting interests attempted during the eight or nine years of defendant's possession and claim with plaintiff's knowledge thereof. In a certain sense the two companies appeared for some time to have acted together with reference to the lands, both before and after the final determination of the

Bacon case by this court. Defendant claims, as an important circumstance in the case, that some of the stockholders and officers of the Pacific Improvement Company were also stockholders and officers of the Sonoma Valley Improvement Company, namely, Chas. F. Crocker, F. S. Douty, Wm. Hood, and perhaps others. There is evidence that Chas. F. Crocker and F. S. Douty were directors in the Sonoma Valley Improvement Company at its organization, and there is evidence that Douty was the secretary of the Pacific Improvement Company in 1899, and signed the notice given defendant to surrender possession. Aside from this circumstance, there is sufficient evidence to justify the inference of the trial court that the plaintiff had knowledge of defendant's contract with the Sonoma Valley Improvement Company, and her claim to the lots in question. It is not material that defendant was not in actual possession, for it was well known to the persons representing these two companies that she and her husband fenced the land, some eighteen acres, planted an acre to orchard, and farmed and leased the balance, and had exclusive control of the land all the time. Nor is it material to charge plaintiff with notice that the precise nature and extent of Riser's and Maxwell's authority should have appeared. It did appear that they represented the company—Riser as an agent for several years, and Maxwell part of the time assuming to represent the plaintiff, and giving Riser directions, the latter understanding that Maxwell represented that company, and taking orders from him as its representative.

Plaintiff relies especially on the lis pendens recorded in the Bacon suit June 6, 1888, as notice to defendant, when the Sonoma Valley Improvement Company made its contract with the Carrigers, dated May 25, 1889, and it is claimed that this contract was made with notice of the adverse claim of Bacon and the other stockholders of the Sonoma Valley Land Company. The Carrigers were not the parties to that suit, and there is no evidence that they had actual knowledge of its pendency. How far it would charge them with notice as between them on the Sonoma Valley Land Company, where the latter was directly concerned, might raise a different question from the one we have here. Conceding that the Carrigers had constructive notice of the claim of the Sonoma Valley Land Company, which was disputed and being contested by the Sonoma Valley Improvement Company, grantor of the

Carrigers, the fact remains that plaintiff bought into that lawsuit with knowledge of the Carrigers' claims, and we do not think plaintiff can take cover behind the lis pendens in a suit to which neither it nor the Carrigers were the parties, and in which at that time plaintiff had no interest. Under the circumstances and facts as they appear, the notice by lis pendens does not prevent the defendant from relying upon her equitable title as against plaintiff.

The record fails to show that the Sonoma Valley Improvement Company ever conveyed to the Sonoma Valley Land Company as directed by the decree in the Bacon suit, and it also fails to show whether the $10,000 was paid by the latter company to the former, as the decree ordered. No doubt, in purchasing the outstanding titles, plaintiff had to pay this money to the Sonoma Valley Improvement Company before it would convey its title, for that was the condition of the decree. But the record shows that plaintiff's title comes from defendant's grantor subsequent to defendant's agreement with plaintiff's grantor, and plaintiff concluded its purchase before this court had affirmed the decree. This shows that it was indifferent to the decision, since it owned all rights involved in the case, and relied on its purchase of these interests, rather than on the chance of the decree being affirmed. With these facts before us, is plaintiff estopped by its conduct and laches from claiming title at this late day? We think the answer of the trial court was a correct solution of the question. The evidence was that the purchasers of the land in controversy took their title from the same source of plaintiff's title, and prior to plaintiff's title; then fenced it, and planted an orchard, cultivated the remaining land after plaintiff's rights had attached, and in full faith in their title; plaintiff stood by and saw this work proceeding year after year for eight or nine years, and during all this time it was exercising ownership over the other unsold portions of the Clarke tract, was confirming contracts and deeds of the Sonoma Valley Improvement Company to persons other than defendant, and at no time notified defendant or her predecessors of any claim to the disputed land, or forbade the exercise of acts of ownership over it, or warned defendant or her predecessors not to spend their money on it in improvements. Without discussing the principles governing estoppel and laches, we think the decision of the trial court that plaintiff is es-

topped from denying defendant's title or setting up title in itself is warranted by the evidence. It is advised that the judgment and order be affirmed.

We concur: Gray, C.; Cooper, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## KYLE v. HAMILTON.

Sac. No. 941; March 18, 1902.

68 Pac. 484.

**Mortgage—Deed as.—Where a Deed is Executed Contemporaneously** with a contract by the grantee to return the deed on the judgment of a debt by the grantor, the delivery of the deed is strong evidence that the contract was also delivered.

**Mortgage—Deed as.—A Deed, and Contract** by the grantee to return the deed on the payment of a debt, were executed at the same time, and evidence that both instruments were delivered to H. for the parties entitled thereto was uncontradicted, and the agreement was shown to have been recognized by grantee prior to the suit. The contract was delivered by H. to the grantee, but the former testified that it was by mistake. Held, sufficient to show the delivery of the contract.

**Mortgage—Deed as.—Where a Deed, and Contract** requiring the grantee to return the deed on the payment of a debt, are made at the same time, and the contract imposes no obligation on the grantor, and the delivery is not conditioned on his signing it, it is not invalid because his signature is not attached thereto.

**Mortgage Foreclosure.—An Allegation, in an Answer** to a mortgage foreclosure suit, that the mortgage was annulled by a subsequent mortgage between the parties, is to be construed as an allegation that there was a novation of the new mortgage for the old.

**Mortgage—Novation.—Under Civil Code, Section** 1530 et seq., in reference to novation, and defining it as the substitution of a new debt for an old, the execution and interchange of a deed and a contract to return the deed on the payment of a debt, intended to take the place of a mortgage securing the debt, is a novation of the mortgage.

**Mortgage—Consideration.**—Under Civil Code, Section 1605, providing that any prejudice suffered by a promisee shall constitute a good consideration, the execution of a deed is sufficient consideration to support an agreement by the grantee to return the deed on the payment of a debt.

**Mortgage—Deed as Substitute for—Mistake.**—Where a Deed is Executed by the parties, as a substitute for an existing mortgage, under a mutual mistaken idea that no foreclosure will be necessary, and may be rescinded by reason of such mistake, under Civil Code, sections 1566, 1578, providing that a consent which is not free may be rescinded, and that mutual mistake of law constitutes mistake, within the meaning of the article, but it is not so rescinded, an agreement that the deed shall be returned on the payment of a debt is binding.

**Mortgage — Foreclosure — Attorney's Fee.**— Where a Mortgage Foreclosure suit is based on a mortgage which has been superseded by a deed given as security for the debt by reason of a mutual mistaken idea that it will obviate a foreclosure, and the mortgage contains an attorney fee clause which is not in the deed, a judgment foreclosing the mortgage and allowing an attorney fee cannot be sustained, as a decree allowing an attorney fee is not authorized by the deed.

APPEAL from Superior Court, San Joaquin County; Joseph H. Budd, Judge.

Mortgage foreclosure suit by Cassie M. Kyle against Moses Hamilton. From a decree in favor of plaintiff the defendant appeals. Reversed.

A. H. Carpenter for appellant; Louttit & Middlecoff for respondent.

PER CURIAM.—This is a suit for the foreclosure of a mortgage, of date October 4, 1894, given by the defendant to the plaintiff to secure the note of the former for the sum of $825, with interest, due October 21, 1896. The complaint is in the usual form. The defense pleaded is, in effect, the alleged substitution for the old of a new mortgage, of date February 5, 1898, in the form of a deed purporting to convey to the plaintiff the mortgaged premises, and an accompanying agreement for the payment of the debt in three installments—two of $100 each, on the first days of November, 1898 and 1899, and the balance October 1, 1900. On this issue the finding of the court was adverse to the defendant;

and judgment was accordingly entered for the foreclosure of the original mortgage. This finding, it is claimed, is not justified by the evidence; and this contention, we think, must be sustained.

It is an undisputed fact in the case that on the fifth day of February, 1898, the defendant, at the instance of the plaintiff, executed to her the alleged deed, and that, at the same time, she signed a document as to terms of payment, as alleged, and for return of the deed on payment. This took place in the office of Henderson, the plaintiff's agent, by whom the documents were drawn; and it is not disputed that the deed was delivered to the plaintiff, and has ever since been retained by her; but it is claimed the agreement was not delivered. But the evidence clearly shows the contrary; for not only is the delivery of the deed under the circumstances strong, if not conclusive, evidence that the agreement (which is part of the same contract) was also delivered, but it appears from the testimony of witnesses, without contradiction, that the agreement and the deed were together delivered to Henderson for the parties respectively entitled; that is to say, the deed for the plaintiff, and the agreement for the defendant. It appears also from the uncontradicted testimony of the defendant that about eight months after the transaction, the agreement was recognized and insisted on by the plaintiff: Pico v. Coleman, 47 Cal. 67. That the agreement was produced on the trial from the possession of the plaintiff is a fact of no importance. Her possession is accounted for by the statement of her agent, Henderson, made to defendant and his attorneys, that he had delivered it to her by mistake. Nor is the fact material that the agreement was not signed by the defendant. Ordinarily, the failure of one of the parties to sign an agreement containing obligations of both would be ground of inference that the writing was not intended as a contract of the party signing. But here the performance of the obligations of the defendant was fully secured by the deed executed by him to the plaintiff, and by the fact that the defeasance executed by the plaintiff bound her only on the terms stated; thus making the general contract complete. Nor is there any reason to suppose that the delivery was made by the plaintiff subject to the condition of its being signed by the defendant. The contrary is clearly apparent from the acts

of the parties, who evidently regarded the transaction as completed, and, in fact, the delivery of the agreement as the contract of the plaintiff, though unsigned by the defendant, was in precise accordance with the agreement as stated by the latter in his testimony, which is not contradicted: Cayton v. Walker, 10 Cal. 456; Tewksbury v. O'Connell, 21 Cal. 69; Cutter v. Whittemore, 10 Mass. 442; Emery v. Neighbour, 7 N. J. L. 145, 11 Am. Dec. 541. This was apparently the view of the court in excluding evidence of what was said by the parties at the time of the transaction, except upon the mere question of delivery. For otherwise the ruling would be error.

The evidence, therefore, fully sustains all the allegations of the answer, unless it be the allegation that the original mortgage "was annulled," which is to be understood as alleging that there was a novation of the new mortgage for the old; and we are of the opinion—assuming the sufficiency of the consideration—that this allegation was also proven. For it was undoubtedly the intention of the parties that the new obligation, to pay the debt at the times agreed upon, took the place of the principal obligation created by the original note, and that it was to be secured by the deed given. It would seem to follow, therefore, that there was a novation, not only of the new for the old principal obligation, but also of the deed, which, it was supposed, would obviate the necessity of foreclosure for the security, or accessory, obligation, by which the note was originally secured. There was, therefore, a complete novation of the new or modified contract for the old (Civ. Code, sec. 1530 et seq.; 2 Whart. Cont., secs. 852–854, 857; 16 Am. & Eng. Ency. of Law, pp. 865–870, and note); and the original note and mortgage remained only "to mark the extent of the new obligation, and [without any] legal existence beyond that": Pimental v. Marques, 109 Cal. 413, 42 Pac. 159.

As to the consideration, this, it is true, was of little or no value to the plaintiff. But consideration may consist exclusively of detriment to the promisor, as well as of benefit to the promisee; and hence, in this case, the defendant's deed must be regarded as sufficient consideration for the agreement of the plaintiff: Civ. Code, sec. 1605; 1 Whart. Cont., secs. 505, 516, 517, 534, and notes; 1 Pars. Cont. 437, and

note; Brooks v. Haigh, 10 Adol. & E. 323. In this respect the case differs from that of Peachy v. Witter, 131 Cal. 316, 319, 320, 63 Pac. 468. There was indeed a mistake of law, common to the parties, as to the effect of the defendant's deed in obviating the necessity of a foreclosure, and the plaintiff might therefore have rescinded: Civ. Code, secs. 1566, 1578. But in the absence of rescission, the contract must be regarded as still subsisting, and as determining the rights of the parties.

It is, however, urged by the respondent that the first payment under the new mortgage was due before suit was brought, and the balance before the case was tried; and hence, it is claimed, there was no error in entering judgment for the whole amount due (Bostwick v. McEvoy, 62 Cal. 496; Hawkins v. Hill, 15 Cal. 500, 76 Am. Dec. 499), and of the correctness of the principle laid down in the cases cited, assuming the pleadings and findings to be sufficient to authorize judgment, there can be no doubt: Orange Growers' Bank v. Duncan, 133 Cal. 256, 65 Pac. 469. But here the suit was brought on the old mortgage, and nothing is said in the complaint about the new, and, though the complaint is aided by the allegations of the answer (Herd v. Tuohy, 133 Cal. 60, 61, 65 Pac. 139), yet these allegations are found by the court to be untrue, and there are therefore no facts found to sustain the judgment. The evidence, indeed, discloses the facts, and there is no controversy with regard to them, and hence, were the objections to the judgment only on the score of the pleadings, it might, possibly, be held that the error was not prejudicial to the defendant, but, in fact, there is another objection to be considered. It is clear, from the nature of the transaction, that the provision of the original mortgage as to attorneys' fees was not carried into the new mortgage, the professed object and supposed effect of which was to render a foreclosure unnecessary. It therefore could not have been the intention of the parties to provide for an attorney's fee for the foreclosure of the new mortgage.

The judgment is reversed and the cause remanded for further proceedings in accordance with the principles laid down in this opinion.

McFARLAND, J.—I dissent, and think that the judgment should be affirmed. In my opinion there was sufficient evidence to justify the finding of the court below that there had not been a substitution of a new mortgage for the one sued on.

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## WILLIAMSON et al. v. STRONG et al.

S. F. No. 2267; March 20, 1902.

68 Pac. 486.

**Replevin.—The Court's Finding, in an Action to Recover the** possession of goods, "that defendants unlawfully and wrongfully detain" the property in question, is a finding on the affirmative defense that the property was not in their possession at the commencement of the suit, and is a finding that defendants were in unlawful possession at the commencement of the action, and is sufficient, in the absence of any evidence to support the affirmative defense.

APPEAL from Superior Court, City and County of San Francisco; George H. Bahrs, Judge.

Action by G. W. Williamson and others against T. E. Strong and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

George D. Collins for appellants; Geo. H. Perry and Fisher Ames for respondents.

SMITH, C.—This is a suit to recover the possession of the personal property described in the complaint, or its value. The complaint is in the ordinary form, and alleges, besides the title of the plaintiff, the value of the property, the taking by the defendant, and other matters, "that said defendants still unlawfully and wrongfully withhold and retain said goods and chattels from the possession of the plaintiff," etc. The answer, besides denying the allegations of the complaint, alleges "that the defendants have no possession of any part of said property, and that at the time of the commencement of said action no part of said property was in possession of defendants, or either of them." The court, in

effect, finds the several allegations of the complaint to be true; and judgment was accordingly entered for the plaintiffs. Motion for new trial was made by the defendant Strong on "the minutes of the court, and on the ground that the decision is against law," and, his motion being denied, he appeals from the order. There is no statement or bill of exceptions in the record.

The only point made by the appellants is that there is no finding on the affirmative allegation of the answer, that the property sued for was not in the possession of defendants at the time of the commencement of the suit. But, assuming that the allegation adds anything to the denials of the answer on this point (which is to be doubted), we think it is clearly covered by the finding "that defendants unlawfully and wrongfully detain" the goods in question. To this finding, indeed, it is objected that it relates to the time of the finding, and not to that of the commencement of the action; but this, we think, is not the case. The findings relate to the issues, which, though made subsequently, always relate to the complaint. Hence, generally, where the contrary intent does not appear, the findings, like the answer, though their language be in the present tense, are to be construed as speaking as of the date of the complaint; and that, in the present case, such was the intent of the finding in question, we do not doubt. Nor is the finding objectionable as being a conclusion of law. It corresponds to the allegation of the complaint, which is in the correct technical form. Nor can it be otherwise construed than as finding that the property was in the possession of the defendants, for otherwise they could not detain or withhold it. The objection of the appellants, it may be added, is also untenable on another ground, which is that it does not appear that there was any evidence tending to prove the allegation in question: Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Hawes v. Clark, 88 Cal. 275, 24 Pac. 116; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Marchant v. Hayes, 117 Cal. 672, 49 Pac. 840.

We advise that the order appealed from be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

## SMITH v. FRESNO CANAL AND IRRIGATION COMPANY.

S. F. No. 2038; March 20, 1902.

68 Pac. 490.

**Nuisance.—On an Issue Whether an Irrigation Ditch which plaintiff had authorized defendant to construct on his land had been materially enlarged by defendant at a later date, and without authority, so as to entitle plaintiff to damages, and to a judgment abating it as a nuisance, where the evidence was conflicting the finding of the trial judge that the ditch had not been materially enlarged was conclusive on appeal.**

APPEAL from Superior Court, Fresno County; E. W. Risley, Judge.

Action by Julia A. Fink Smith against the Fresno Canal and Irrigation Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. E. Church for appellant; Frank H. Short for respondent.

CHIPMAN, C.—Plaintiff is the owner of certain land in Fresno county, and brought the action against defendant for damages, and to abate a nuisance; alleging that in 1896 it unlawfully and without right entered upon plaintiff's said premises, "and dug and excavated a large irrigating ditch along and across the whole north side thereof." Defendant answered that it constructed the ditch in 1891, with the consent and at the request of plaintiff. The cause was tried by the court without a jury, and it found that the ditch or canal was constructed in the year 1891, "with the consent and approval and at the instance and request of plaintiff"; that, as first constructed, the ditch was "about eight feet wide on the bottom, and from fifteen to twenty feet wide on the water surface, and on the top of the banks twelve or fifteen feet more, and that said ditch was completed, cleaned out, and somewhat widened and enlarged in the year 1892"; that plaintiff has not been damaged by the said work. Judgment passed for defendant, from which, and from the order denying her motion for a new trial, plaintiff appeals.

The evidence is undisputed that defendant constructed the ditch over plaintiff's lands in 1891 with plaintiff's consent and approval, and at her request; and there is evidence that it was completed in 1892 substantially as it now is, and as it was originally designed. The work that was done on the ditch at this early date was known to plaintiff, and we do not understand that the controversy arises as to what was then done. The principal point of contention of plaintiff is that the evidence shows that the ditch was greatly enlarged in 1895 or 1896, and the complaint alleges that it was done in 1896. The case illustrates what is very commonly found to occur in the elucidation of facts in legal controversies, namely, that witnesses disagree diametrically as to obvious physical facts, and as to when they occurred. Plaintiff's evidence tended to show that defendant had materially and substantially enlarged its ditch as late as 1895 or 1896; that when first built, and water was running through it, a man could easily step across it, whereas at the surface of the water now, when partly filled, the ditch is twenty-two feet wide. There was evidence equally pointed that the enlargement of the ditch took place about the time alleged, i. e., as late as 1895 or 1896. On the other hand, defendant was able to show that the ditch has not been materially enlarged since 1892; that defendant did, since that time, clean out the grasses that obstructed the flow of water, and did take out some parts of the bottom to give a more uniform flow and grade to the ditch, but that there had been no material change in the size of the ditch or in its construction, except as last above stated, since 1892. It was the exclusive function of the trial judge to discover where the truth was to be found in this maze of contradictory and conflicting evidence, and, having exercised this prerogative in favor of defendant, the rule precludes this court from interfering with the decision. It may be conceded that a license to do a particular thing cannot by the licensee alone be changed into a license to do something else, nor can the burden upon the servient estate be by him alone increased. The difficulty here is that the facts as found by the court present no occasion to apply the principle.

Plaintiff insists that the decision was wrong, and not justified from the findings of fact, because, as is claimed, plaintiff was entitled to some damage, if not the amount claimed.

Plaintiff was in no wise concerned as to the quantity of water the ditch carried. There was evidence from which the court might have concluded that the clearing out of the ditch in 1895, or 1896, and removing some of the obstructions from the bottom so as to give a freer flow of the water, were things which defendant might do as incidental to the license to construct the ditch. It was claimed that the land was damaged by the water of the ditch subirrigating the soil, and causing alkali to rise to the surface. The evidence was conflicting upon this, as upon the principal issue in the case.

It is advised that the judgment and order be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## RYAN v. PACIFIC AXLE COMPANY.

S. F. No. 2051; March 24, 1902.

68 Pac. 498.

**Corporate Officer—Action for Salary—Self-serving Declaration.** In an action against a corporation for salary as secretary, defended on the ground that the claim therefor had been waived by special agreement, a statement prepared by a bookkeeper of defendant at plaintiff's request containing entries of amounts of salary due on the debit side of the ledger in favor of plaintiff was a self-serving declaration, whose admission was prejudicial error.[1]

**Appeal—Harmless Error.—A Case Having Been Tried on the Theory** that a particular issue was presented, a party cannot claim on appeal that there was no such issue, for the purpose of claiming as harmless error in admitting evidence thereon.

**Corporate Officer—Waiver of Salary.—To Sustain the Right** of the secretary of a corporation to claim a salary for his services after he had waived the right thereto by a special agreement with other officers, whereby each was to do likewise, it cannot be shown that another officer had received money from it by reason of questionable transactions.

[1] Cited in the note in 136 Am. St. Rep. 917, on the right of officers of a corporation to compensation for their services.

APPEAL from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Action by Thomas E. Ryan against the Pacific Axle Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

W. S. Goodfellow and Garret W. McEnerney for appellant; Reinstein & Eisner for respondent.

COOPER, C.—This action was brought to recover of defendant corporation the sum of $1,819.31 for alleged services rendered by plaintiff's assignor, McCrosson, as secretary of defendant, at a salary of $75 per month, for the two years prior to the commencement of the action, October 19, 1895. The case was tried with a jury, and a verdict returned in favor of plaintiff for the sum of $1,050. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order.

The principal defense relied upon was that a special agreement had been made in May, 1892, between McCrosson, the secretary of defendant, Noble, the president, and Hendrie, a director, and the superintendent, by which they each and all agreed to serve thereafter without salary, and to waive and forego any future salary. To this defense the defendant directed most of its evidence, and presented testimony which would have justified the jury in finding the agreement to have been so made. The defendant called one Spillane, who was its bookkeeper at the times mentioned in his evidence. He gave important testimony tending to support the contention of defendant as to the agreement. He had charge of defendant's books, and was cross-examined as to various items in the ledger. He was during cross-examination shown a paper by plaintiff's counsel which he testified was prepared in response to a request from McCrosson, who was admitted to be interested in the case, and was taken partly from the books of defendant; but in the statement were certain entries on the debit side of the ledger which were made at the time of preparing the statement, at the suggestion or dictation of McCrosson. These entries were: "Salary from April 31st, 1892, to December 31st, 1892, 8 months, at $75, $600. Salary 12 months, at $75, year 1893, $900. 1894, sal-

ary 11 months, at $75, $825." Counsel for defendant objected to the paper being received in evidence upon the ground that it is a self-serving declaration. The court overruled the objection, and the paper was read in evidence. This was clearly prejudicial error. It was, as to the items herein quoted, purely an ex parte statement, made by McCrosson, or by the witness Spillane at the request of McCrosson. It was not a copy of the book of entries, and was not even made under the sanction of an oath. The question before the jury was as to whether or not the salary continued after May, 1892. The document, being made by defendant's bookkeeper, might have been regarded by the jury as an admission or entry of a solemn nature tending to prove the fact that the corporation was to pay McCrosson's salary during the time in controversy. It cannot be said that the jury disregarded it. The judge, in overruling the objection, certainly treated it as material and competent. After it had received judicial sanction, and was admitted in evidence, it is natural to presume that the jury treated it as of some importance. If the judge thought it important and competent, it would be absurd to assume that the jury, notwithstanding this, looked at it from the critical standpoint of a lawyer. The defendant had the right to insist upon the case being tried upon legal and competent evidence. It may be that this piece of evidence was the straw that tipped the scales in favor of plaintiff. While this court always hesitates to reverse a case on account of an error in the admission of evidence, yet it will do so where it is not clear that the error was harmless.

It is said by respondent that the testimony of Spillane as to making the entries is contradicted by McCrosson. McCrosson testified that the defendant never gave him credit for his salary, and that he returned the first statement given him by Spillane, and told Spillane that he wanted a statement of his salary credits. Respondent further contends that there was no issue made by the pleadings as to the special agreement of May, 1892, and that for this reason the evidence was harmless. A conclusive answer to this is that the evidence was all admitted and the case tried upon the theory that the issue was presented by the pleadings. No single objection appears to have been made as to the relevancy of the evidence under the pleadings. Not only

this, but the court instructed the jury that, if they believed from the evidence that McCrosson waived his salary, the plaintiff could not recover. The evidence further showed that about May, 1892, the principal part of defendant's business was turned over to the Atlas Iron Works, a corporation in which McCrosson was interested, and of which he was a director. He became secretary of the latter corporation about this time, and received a salary of $150 per month from it. This salary was paid by the latter corporation during the time plaintiff claims he should receive a salary from the defendant. This evidence having been received without objection upon the theory that it was relevant under the issues, plaintiff will not now, for the first time, be allowed to claim that there was no such issue: McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278. In the cross-examination of the witness McCrosson as to the agreement of May, 1892, waiving salaries, counsel for defendant asked questions for the purpose of showing that after this date the president did not receive any salary. In answer to a question the witness volunteered the remark that the president "drew fifty dollars a month on another account, which was equivalent, from the company." Counsel for defendant moved to strike out this voluntary statement and the court denied the motion. On redirect examination plaintiff's counsel asked the witness the following question: "You spoke of Mr. Noble having received $50 per month from some other source, which was the equivalent of his salary. What do you mean by that?" To this question counsel for defendant objected on the ground that it was incompetent, irrelevant and not redirect examination. The court overruled the objection, and the witness was allowed to go into the details of a lease, through a member of Noble's family, to defendant, of a piece of land, by which Noble made $50 per month out of defendant. It is not necessary to decide as to whether or not this evidence is of such character that, standing alone, it would necessitate a reversal of the case. It was clearly incompetent, and the rulings of the court in relation thereto erroneous. Plaintiff could not claim a verdict for the salary of McCrosson by showing that some other officer of defendant received money by reason of questionable transactions. If McCrosson made an agreement, upon valid consideration, to forego and not charge any salary, the agreement was binding upon him,

even if every other officer of the corporation made money out of it by improper methods. It is unnecessary to discuss other alleged errors.

The judgment and order should be reversed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

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## PEOPLE v. EATON.*

Cr. No. 798; March 24, 1902.

68 Pac. 583.

**Witness—Cross-examination.—Where, on a Prosecution for Rape,** the prosecuting witness had already testified that she had agreed to go with a certain party to the dance from which she was returning when the crime was committed, but that she did not intend to keep the engagement, and did not expect to meet him when she left her home that evening, there was no error in excluding further questions as to whether she had agreed to go to the dance with him, and whether she knew when she left her home that she was going to meet him.

**Witness—Cross-examination.—Where, on a Prosecution for Rape,** the prosecuting witness testified that defendant and his participants in the crime struck her "with the fist," and then described the injuries inflicted, in such a way as to show that the blows must have been powerful and solid, there was no error in excluding a question as to whether the blows were "powerful, solid blows with the fist."

**Witness—Annoying or Insulting Questions.**—Under Code of Civil Procedure, section 2044, providing that the court must exercise reasonable control over the examination of a witness, so as to make it as little annoying to the witness as possible, and section 2066, providing that it is the right of a witness to be protected from insulting questions, etc., where a witness testified to certain facts as seen by him, and it appeared from the testimony that the facts were not physically impossible, there was no error in refusing to allow the witness to be asked if he did not know that he was testifying to what was physically impossible.

*Rehearing denied April 23, 1902.

**Witness—Control of Examination by Court.—Under Code** of Civil Procedure, section 2044, providing that the court must exercise reasonable control over the mode of examination, where counsel made a statement to a witness that he was taking a great deal of interest in the case, and wanted to see defendant convicted, expecting witness to answer, there was no error in requiring the examination to be conducted by questions as to interest, instead of by such statements.

**Witness—Interest in Case.—Where a Witness, Who had Participated,** as a police officer, in the preparation of the case for the prosecution, testified that he was no more than ordinarily interested in the case, and as to experiments made by him, there was no error in excluding the question whether, in view of the experiments, he still testified that he had no more than ordinary interest in the case.

**Criminal Law.—There was No Error in Instructing the Jury** that the police officer was under no obligation to assist the defense of any of the parties to the crime by making any experiment.

**Criminal Law—Reading Testimony to Jury.**—Where, on a criminal prosecution, the testimony of a witness was read to the jury at their request, it was not error for the judge to have the last question re-read to him.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

William Eaton was convicted of rape and he appeals. Affirmed.

A. L. Frick and Frederick C. Clift for appellant; Tirey L. Ford, attorney general, and C. N. Post, deputy attorney general, for the people.

SMITH, C.—The defendant was convicted of the crime of rape, and sentenced to imprisonment in the state prison for the term of forty-five years. Objections are made to certain rulings of the court in the exclusion of testimony and in an instruction to the jury, but none of them, we think, are tenable. We subjoin the several questions excluded, with the instruction objected to, adding such comments as may be necessary.

1. The following questions were asked of the prosecuting witness: "You had the night before agreed to meet Bert Chattel, and attend the Portuguese celebration with him? That is so, is it not? You knew when you left your home,

upon the night of the 2d of June, that you were going to meet Bert Chattel? That is a fact, is it not?" These questions referred to a dance which the witness had attended in company with Chattel on the night of the crime, and from which she was returning when the crime was committed; and she had just testified that she had "agreed to go with Bert Chattel, but . . . . did not intend to keep [her] engagement"; and that "when [she] left the house upon the evening [in question she] did not expect to meet" him. Both questions had thus been already answered, and the repetition of her testimony on this point could have been of no advantage to the defendant. Nor was there any error in refusing to permit it: Davis v. Baugh, 59 Cal. 568.

2. The witness was also asked the following question, which was excluded by the court: "Those blows were powerful, solid blows with the fist? Isn't that true?" But the witness had just testified that she had been struck by the defendant and his participants in the crime "with the fist," and she had also described the injuries thereby inflicted, from which it appeared, better than by any number of adjectives, that they were "powerful, solid blows." There was no error, therefore, in excluding the question.

3. The following question to the witness Anderson was excluded: "You know you are testifying to what was physically impossible? Isn't that so, sir?" The witness had just testified to certain facts as actually seen by him. From this it sufficiently appeared that what he had seen was not physically impossible, and the question was therefore, in effect, whether the witness did not know that he had testified falsely. The court, therefore, was quite right in excluding it: Code Civ. Proc., secs. 2044, 2066.

4. The witness was also asked or informed as follows: "You have taken a great deal of interest in this case, and want to see this defendant convicted?" To which the court said, "That is not a question," but added: "You may ask him as to his interest." This was, in effect, simply to require of the counsel to put his assertion in the form of a question, which was not an unreasonable requirement": Code Civ. Proc., sec. 2044.

5. The following question was asked of the witness Hammerton, and excluded: "Do you still testify, in view of your

action with reference to making this experiment, that you have no more interest in these cases, including the one upon trial, than you have in cases which ordinarily come under your observation as a police officer?" The witness to whom the question was addressed had, as a police officer, participated in the preparation of the case for the prosecution, and had testified to an experiment made by him, at the request of the attorney of one of the parties to the crime, with a view of proving the physical impossibility of facts testified to by the witness Anderson. But the witness had already testified that he was no more than ordinarily interested in the case, which was the material fact. Nor was there anything in the circumstance referred to in the question tending to show that he was wrong, or requiring him to say whether or not he was still of the same opinion. Nor was it error in the court, in response to the claim of the counsel to the contrary, to inform the jury "that [the] officer was under no obligation to assist the defense in the Keating case, or in this case in making any experiment."

6. After the case was submitted, the testimony of the witness Smart was read to the jury by the reporter at their request; and upon the completion of the reading, "without any request from any one of the jurors, and without asking the defendant's or his attorney's consent thereto, the court, of its own motion, said to the reporter: 'What is that last question? Read it again' "—and the question and answer were accordingly read. It is now objected that this was error. But if so, there was no objection made or exception taken, and on that account the error, if any, cannot be reviewed. We do not, however, see any impropriety in the judge having re-read to him matter that had escaped his ear.

We advise that the judgment and order appealed from be affirmed.

We concur: Gray, C.; Chipman, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

# CITY STREET IMPROVEMENT COMPANY v. BABCOCK.*

S. F. No. 2002; March 24, 1902.

68 Pac. 584.

**Street Improvement.—In an Action on a Street Assessment,** the court found that the board of supervisors did not duly pass a resolution ordering the work to be done, instead of finding the facts from which it might appear that the resolution was not duly passed. Held, sufficient.

**Street Improvement—Objection.—The Street Improvement Act** requires (Stats. 1891, p. 196, sec. 3) that a written objection, intended to delay proceedings for an improvement, and required to be made within a specified time, "shall be delivered to the clerk of the city council who shall indorse thereon the date of its reception by him." Held, that the efficacy of such objection was dependent as much on the indorsement authenticated by the clerk's signature as on the delivery thereof, and that mere delivery was not enough.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action on a street assessment by the City Street Improvement Company against William Babcock. From a judgment for defendant and from an order denying a new trial plaintiff appeals. Reversed.

J. C. Bates for appellant; Geo. D. Collins for respondent.

HARRISON, J.—The complaint alleges that on October 22, 1894, the board of supervisors "duly made and passed" a resolution ordering the work to be done, and also contains allegations of the subsequent proceedings up to and including the recording in the office of the superintendent of the return upon the warrant and assessment. The answer denies that the board of supervisors duly made and passed the resolution ordering the work, and also denies various other allegations of the complaint. The court finds that the board did not duly make or pass any resolution ordering the work. The appellant contends that this finding is insufficient; that,

*For subsequent opinion in bank, see 139 Cal. 690, 73 Pac. 666.

instead thereof, the court should have found the facts from which it might appear that the resolution was not duly passed. In Pacific Paving Co. v. Bolton, 97 Cal. 8, 31 Pac. 625, it was held that, under section 456 of the Code of Civil Procedure, an allegation of the ordering of the work in this form was sufficient. That section also provides: "If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." It does not follow, however, that in making its finding upon this issue the court must find those facts. The findings should be of the ultimate facts pleaded, not of the probative facts: McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14. The ultimate fact to be found is the jurisdiction of the board to pass the resolution. The finding that the board did not duly pass the resolution is equivalent to a finding of that ultimate fact. If the evidence is insufficient to sustain such finding, the particular facts of such insufficiency can be specified in the statement upon a motion for a new trial.

The court also found that on February 26, 1894, the board of supervisors passed a resolution of its intention to order the work, but that, within ten days after the publication and posting of a notice thereof, the owners of a majority of the frontage of the property fronting thereon delivered written objections to the same to the clerk of the board, who thereupon indorsed thereon the date of its reception by him, and that the said board thereafter sustained the said objections. This finding is challenged by the appellant as not sustained by the evidence. A document containing objections to the improvement, purporting to be signed by the owners of a majority of the frontage liable to be assessed therefor, was introduced in evidence on the part of the defendants, bearing the indorsement "Clerk's Office. Filed Mar. 5, 1894. San Francisco, Cal. Board of Supervisors." The superscription upon the document was not signed or authenticated in any manner, nor was it shown by whom the indorsement was made. It was, however, shown that at a meeting of the board of supervisors on March 5th this paper was read and referred to the street committee; that that committee afterward reported that the protest contained therein was a bar for six months to any further proceedings in relation to the performance of the work, and that on March 12th this report was read at a meet-

ing of the board of supervisors, and adopted as the action of the board.

Under the provisions of the street improvement act, if a majority of the owners of the frontage properly present a protest against the improvement, the board of supervisors has no jurisdiction to order the work, except upon the subsequent passage of another resolution of intention after the expiration of six months from the presentation of such protest: City Street Improvement Co. v. Babcock, 123 Cal. 205, 55 Pac. 762. The provisions upon this subject are contained in section 3 of the act, and are as follows: "The owners of a majority of the frontage of the property fronting on said proposed work or improvement, where the same is for one block or more, may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notice, which objection shall be delivered to the clerk of the city council, who shall indorse thereon the date of its reception by him, and such objections so delivered and indorsed, shall be a bar for six months to any further proceedings in relation to the doing of said work, or making said improvement": Stats. 1891, p. 196. The respondent contends that these provisions of the section were complied with in the present case; that the delivery of the protest at the office of the clerk of the board of supervisors constituted a filing thereof, and operated as a bar to any further proceedings under the previous resolution of intention, and that the evidence thereof sustains the finding of the court. On the other hand, the appellant contends that, as the section requires that the protest must be not only delivered to the clerk, but also that he must "indorse thereon the date of its reception by him," the mere delivery to him is not enough; that the indorsement required must be made by him and authenticated by his signature; and that unless these acts are all performed, the protest does not become effective.

The entire proceeding for the improvement of a street is of statutory creation, and whatever acts the statute requires to be performed within any designated time, or in any prescribed form, must be performed within that time and in that manner, in order that they may have the effect which the statute prescribes for them. Originally the filing of a paper consisted in having the proper officer put it upon the string—filum—on which the other papers in the proceeding

were placed. In modern days it is usually held that a paper is filed on the part of the party who is required to file it when he has presented it at the proper office and left it with the person in charge thereof (Tregambo v. Mining Co., 57 Cal. 501), and paid the fees for filing, if any are required (Boyd v. Burrel, 60 Cal. 280). The subsequent omission of the officer to make any indorsement thereon will not prejudice his rights. It is, however, the duty of the officer to whom the paper is delivered to indorse thereon the date of its reception, and to authenticate the same by his official signature. Thereupon the filing is completed: Burrill, Law Dict., "File"; Holman v. Chevaillier's Admr., 14 Tex. 337. In order, however, that there may be no dispute as to the sufficiency of the filing of a protest, the street improvement act provides, in express terms, that, not only shall the owners deliver the protest to the clerk, but also that that officer shall indorse upon it the date of its reception by him. Unless the objections are "so delivered and indorsed by him," the proceedings for the improvement are not barred. The purpose of this provision is apparent—to make the date at which the objections were delivered to the clerk a matter of record, so that, upon a mere inspection thereof, it may be seen whether they were delivered in time, and that the time at which they were delivered shall not be left to be determined upon the varying recollections of witnesses; and, as in the case of all records, unless the indorsement is authenticated by the officer, it does not become a "record." This rule was laid down at a very early day in this state in the following terms: "To become a record, it must be the official act of the officer authorized to make it. To become his act, it must have his signature. Until signed it is the act of no one, and is as valueless for any purpose as an unsigned deed or sheriff's return. The only difference between that which is record and that which is not is the official stamp or authenticity which the former bears upon its face. The former proves itself; the latter does not. The former proves itself because it bears the stamp of an officer of the law acting under the solemnities of an oath, or at least of official duty; and it is the official stamp, and nothing else, which makes it record": Himmelman v. Danos, 35 Cal. 441. See, also, Dougherty v. Hitchcock, 35 Cal. 512. As the object of filing

the protest is that it may become a matter of record, it must be authenticated as fully as any other record. The filing of a document which is not to be transcribed into the formal records of the office must bear the official indorsement of the officer in whose custody it is placed; otherwise it does not become a matter of official record. If it be merely marked with the date of its reception, such indorsement is not only without any official sanction, but resort must be had to parol evidence to determine by whom the indorsement was written. It must be held, therefore, that the above finding of the court was without sufficient evidence to sustain it.

The subsequent action of the supervisors in determining that the protest was sufficient to bar the proceedings was of no effect. Until the protest had been properly filed, the board had no jurisdiction to pass upon its sufficiency. Unless there had been a proper protest against the work, the subsequent action of the board in ordering the work was within the jurisdiction acquired under the resolution of intention passed February 26th, and the court erred in holding that the order was not duly passed.

The judgment and order denying a new trial are reversed.

We concur: Garoutte, J.; Van Dyke, J.

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## PEOPLE v. WHEELOCK.

Cr. No. 806; March 31, 1902.

68 Pac. 579.

**Homicide—Evidence—Sufficiency.—The External Marks and Bruises** about deceased, who was an old woman, living alone, and the condition of her clothing and person, showed she was strangled in resisting a rape. The circumstantial evidence against accused showed his presence at deceased's home; and a witness stated that accused, who had been drinking, said repeatedly that he proposed to sleep with deceased that night, or choke her to death, and on leaving witness he went in the direction of her house. Accused relied on his uncorroborated evidence, with testimony to discredit such witness. Held, sufficient to justify a conviction for the murder of deceased.

APPEAL from Superior Court, Butte County; John C. Gray, Judge.

James F. Wheelock was convicted of murder and he appeals. Affirmed.

George E. Gardner for appellant; Tirey L. Ford, attorney general, for the people.

HENSHAW, J.—The defendant was convicted of the murder of Emily Martin, and by the verdict of the jury the death penalty was decreed. An appeal was taken to this court upon July 17, 1901. The case has twice been upon the calendar of the court, but no brief has been filed in support of the appeal, nor has there been any appearance by appellant's counsel. Without such assistance, we have, therefore, been left the specifications of errors alone. These, with the whole record, have been given the consideration which the gravity of the case demands; but, after such consideration, we are unable to perceive any error entitling the defendant to a new trial. Mrs. Martin was an aged woman, of nearly seventy years, living by herself in a little cabin. She was found in her home, dead. The external marks and bruises about her face and throat pointed to strangulation as the cause of death, and this was confirmed by the autopsy. In addition, the condition of her clothing and person gave every indication that she had met her death in resisting a rape. The circumstantial evidence against defendant showed his presence at the home of Mrs. Martin at this time, and never after his visit was she seen alive. But the evidence against the defendant was not wholly circumstantial. There is the direct testimony of one witness that the defendant, who had been drinking, said, and said repeatedly, that he proposed that night to sleep with Mrs. Martin, or choke her to death; that he would not be dissuaded from his horrible purpose, and, when he left the witness, it was to go to Mrs. Martin's house. The defense as to the main issue consisted in the uncorroborated testimony of the defendant himself, denying his presence at Mrs. Martin's cabin, coupled with testimony tending to discredit the veracity of the witness who testified to the defendant's declaration of his purpose.

Upon consideration of the whole case, the evidence was sufficient to justify the verdict of the jury, and the judgment and order appealed from are therefore affirmed.

We concur: McFarland, J.; Garoutte, J.; Van Dyke, J.; Temple, J.

## PEOPLE v. KEITH.*

Cr. No. 797; April 16, 1902.

68 Pac. 816.

**Rape—Cross-examination as to Previous Offenses.**—In a prosecution for rape it was error to compel defendant on cross-examination to testify to the fact of his having had sexual intercourse with the prosecutrix on two prior occasions, one of which was more than a year before the crime charged was alleged to have been committed, and at a time when the prosecutrix was under the age of consent, such evidence not having been touched upon in the direct examination.[1]

APPEAL from Superior Court, Yolo County; E. E. Gaddis, Judge.

William Keith was convicted of rape, and from the judgment and from the order denying a new trial he appeals. Reversed.

J. C. Ball for appellant; Tirey L. Ford, attorney general, A. A. Moore, Jr., deputy attorney general, and E. R. Bush, district attorney, for the people.

PER CURIAM.—The defendant has been charged and convicted of the crime of rape. He appeals from the judgment and order denying his motion for a new trial. His first contention is that the evidence is insufficient to support the verdict; but, in view of the fact that the court has concluded the cause must be returned to the trial court upon other grounds, we find it unnecessary to consider the contention raised as to the insufficiency of the evidence. Defendant was a witness in his own behalf, and upon his examination in chief he testified that he had a conversation with the prosecuting witness shortly after the alleged commission of the offense, as follows: " 'Cindy, why did you tell

*For subsequent opinion, see 141 Cal. 666, 75 Pac. 304.

[1] Cited and approved in Harrold v. Territory of Oklahoma, 169 Fed. 52, 94 C. C. A. 415, a larceny case. The court said: "If the cross-examiner would inquire of the witness concerning matters not opened on the direct examination, he must call him on his own behalf."

Charlie Morris about me having anything to do with you?' She says, 'Well, I never told him.' I says, 'You must have told him, for he told me the very spot you and I went.' She says, 'You are a liar; I never told him.' " Whether or not this evidence was incompetent and irrelevant becomes immaterial, for no objection was made to it upon the part of the people. But upon cross-examination by the district attorney the defendant was compelled to testify, under objection and exception, that he had had sexual intercourse with prosecutrix upon two prior occasions, one of which was something more than a year preceding the time at which the crime here under investigation was charged to have been committed. The trial took place in December, 1900, and, as prosecutrix testified that her age was seventeen years, it is fairly apparent that at the time the prior act of intercourse was committed she was under the age of consent. That being so, intercourse with her at that time by the defendant, regardless of the question of force, amounted to rape. For this reason the above cross-examination, upon its face, not only seems to have been highly improper, but certainly was prejudicial to defendant. Upon his examination in chief he had not been questioned as to any facts concerning prior acts of intercourse, and therefore the cross-examination was not proper. He had only testified as to a conversation had with the prosecuting witness, and to that matter alone the cross-examination should have been confined.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

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## BUTLER v. BURT.

S. F. No. 2284; April 25, 1902.

68 Pac. 973.

**Rent.—The Complaint in an Action for Rent Alleged** that, after plaintiff had commenced a suit to foreclose a mortgage on the leased premises, defendant entered into possession under an agreement requiring him to pay a portion of the rent to plaintiff and a portion to the mortgagor. The answer set out a lease with the mortgagor alone, under which defendant claimed that he took possession of the property; but it required the payment to plaintiff of the same portion of

the rent as alleged in the complaint. The answer also set out a guaranty of possession to defendant, which had been executed by plaintiff. Held, not such a variance as to the manner of leasing the property as would preclude judgment on the pleadings in plaintiff's favor.

**Rent.—Where a Tenant Enters into Possession** of the leased premises under a lease reciting a decree of mortgage foreclosure and order for the sale of the property, and requiring the tenant to pay a portion of the rent to the mortgagee if he purchases the property at the foreclosure sale, the fact that the mortgagee has the decree and order of sale set aside does not preclude him from recovering such rent, after he has purchased the property at a sale under a subsequent decree in the same suit.

**Rent.—The Defendant in an Action for Rent Alleged** the surrender of possession and the payment of $140 to plaintiff on the day when the latter commenced an unlawful detainer suit. The claim in the action for rent was to a certain date, and the rent from that time till the surrender of the premises would amount to $140 at the rate at which the property was rented. It was also alleged that such payment and surrender of possession was under the agreement that it was not to be taken as an admission by defendant that plaintiff had any claim against defendant for rent. Held, that it was not error, in rendering judgment for plaintiff on the pleadings, which did not show any defense, to refuse to give defendant credit for the $140.

**Pleading—Amendment.—A Cause will not be Reversed** by reason of a failure to allow the amendment of a pleading when no permission to amend is asked.

APPEAL from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action for rent by John W. Butler against John J. Burt. From a judgment for plaintiff the defendant appeals. Affirmed.

J. J. Burt in pro. per.; Joseph Hutchinson for respondent.

COOPER, J.—This is an appeal from a judgment for plaintiff on the pleadings, which were verified. The complaint alleges that on the twenty-first day of August, 1895, one Soule was the owner of the premises described in the complaint, and that plaintiff had commenced a suit for the foreclosure of a mortgage thereon; that it was understood and agreed, between plaintiff and Soule, that, in case of sale

by virtue of the foreclosure proceedings, the plaintiff would purchase the premises; that defendant was anxious to obtain a lease of the said premises, and a written agreement was entered into, by the terms of which the defendant rented the premises at the monthly rental of $35 from the first day of September, 1895, the rent, after foreclosure sale, to be paid, one-half to Soule and one-half to plaintiff, until the period allowed by law for the redemption of the premises should expire, and thereafter the whole to be paid to plaintiff; that defendant entered into possession of said premises, under the lease, on the twenty-first day of August, 1895, and continued in possession thereof under said lease until the last day of December, 1897; that the premises were sold under the decree of foreclosure on May 21, 1896, and the time for redemption thereof expired November 21, 1896, at which time the said Soule conveyed the said premises by deed to plaintiff, and also assigned and transferred the said lease, and plaintiff has ever since been the owner of said premises and of said lease; that no part of the rent was paid to plaintiff after June 1, 1896; but that $17.50 per month for the months of June, July, August, September, October and November, 1896, and $35 for each month thereafter to the end of the year 1897, amounting to $560, is due and unpaid from defendant to plaintiff under the terms of said lease. The answer attempts to deny the allegations of the complaint, but each denial is followed by the qualifying words "otherwise than herein stated." We must then look to the affirmative part of the answer to see the admissions "otherwise therein stated." The answer alleges the leasing of the premises from Soule, and sets forth a copy of the lease as Exhibit A annexed to the answer. It is argued by the defendant that this allegation constitutes a defense, for the reason that it is a different lease from that set forth in the complaint, being a lease from Soule alone, and not from Soule and plaintiff jointly. But the lease, although signed by Soule alone, expressly provides that one-half the rent is to be paid to plaintiff, in case he becomes the purchaser at foreclosure sale, until the time for redemption expires, and then the whole thereof to be paid to him. Defendant also sets forth, as a part of his answer, Exhibit C, which is

a copy of an agreement or guaranty signed by plaintiff confirming the lease during the period of redemption, and guaranteeing defendant the further possession of said premises for the remaining six months of the year after the time for redemption should expire, upon the payment of said sums, precisely as named in the lease. The lease and this guaranty as set forth by defendant should be read together. They constitute the lease as alleged in the complaint, and show that it was made by and with the consent of plaintiff and Soule jointly. There is no variance.

When the lease and guaranty were made and delivered to defendant, they recited that a decree of foreclosure and order of sale had been made in the action brought by plaintiff against Soule to foreclose the mortgage. The answer alleges that the plaintiff, without notice to him, had this first decree and order of sale set aside, and that for this reason there was never any sale under the decree of foreclosure as contemplated by the parties, and thus no rent became due by virtue of the sale and purchase by plaintiff. If defendant could be permitted to occupy and use the premises, and then make the defense claimed, the answer is otherwise felo de se. It alleges that the court thereafter entered another decree of foreclosure in the same action, upon which an order of sale issued, and plaintiff became the purchaser at such sale. How defendant was injured by the decree being set aside and another decree being entered is not apparent. He was not in any way interested in the amount of the judgment in foreclosure, nor its payment. His right to possession was not curtailed, but extended, by the new decree. He remained in possession before the sale, thereafter during the time allowed by law for redemption, and then for more than six months thereafter. The time for redemption mentioned in the lease and in the written guaranty of plaintiff was "from any sale under said decree." This included and meant to include any sale in the foreclosure proceedings. It certainly cannot be allowed as just and equitable that defendant should remain in possession of the premises, without any disturbance, with no new landlord, and refuse to pay rent because the decree under which the sale was made was modified or changed before the sale. He held possession

under the terms of the lease. He must pay rent, under its terms, and to the parties therein named.

Defendant claims that the answer set forth the payment of $140 which should have been credited to him and deducted from the rent found to be due. The answer simply states that prior to the first day of May, 1898, the plaintiff had commenced a suit against defendant in unlawful detainer to recover the possession of the premises, and that on that day he "paid to said plaintiff the sum of $140, and surrendered the possession of said premises." We are not informed that the said $140 was paid on account of rent, or for damages for holding over after December, 1897, to May 1, 1898. But as $140 is the amount of rent for January, February, March and April, 1898, at $35, and as no claim is made by plaintiff for rent during these months, if we were to indulge in probabilities, we would conclude that the $140 was paid as rent for these months. This appears more evident from the allegation following to the effect that the payment and surrender of possession was with the expressed stipulation that it was not "to be taken as an admission on the part of the defendant that plaintiff had any claim against him in regard to the possession of said premises or any rental therefor." The answer does not deny the lease and its terms; it does not deny that defendant entered thereunder and held possession; it does not deny that the rent is unpaid; nor does it allege any defense to the action. Plaintiff was entitled to an explicit and specific denial of the material allegations of his complaint, or, if they were not denied, to a statement by way of defense of such new matter as would bar or defeat the action.

We are told by defendant in his reply brief that, conceding the answer to be defective, it was an abuse of discretion in the court not to allow defendant to amend. It appears by the bill of exceptions that the defendant, at the hearing of the motion, asked leave to amend his answer, which leave was granted and the amendment filed. The motion was then based upon the pleadings with the answer amended and submitted. It does not appear that any request for permission to again amend was made. It would be a new rule to hold that the court abused its discretion in refusing permission to amend when no such permission was asked. The rec-

ord shows but one request to amend, and that the court granted.

The judgment should be affirmed, and we so advise.

We concur: Smith, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## BRITE v. BRIGGS et al.

L. A. No. 242; April 30, 1902.

68 Pac. 973.

**Frivolous Appeal—Damages.—Where No Circumstances showing peculiar hardship appear, damages for a frivolous appeal will not be awarded on a dismissal thereof.**

APPEAL from Superior Court, Kern County; J. W. Mahon, Judge.

Action by C. R. Brite against John E. Briggs and another. From a judgment for plaintiff the defendants appeal. Appeal dismissed.

T. M. McNaman for appellants; B. Brundge for respondent.

PER CURIAM.—The appeal of the defendants herein is dismissed for failure to file transcript in time. Damages for a frivolous appeal are not awarded upon a dismissal, where no circumstances of peculiar hardship appear.

## HERBERT CRAFT CO. v. BRIAN et al.*

Sac. No. 847; May 2, 1902.

68 Pac. 1020.

**Trust Deed.—In an Action to Recover the Balance Due** on a note after sale under a trust deed securing it, a claim set up in defendant's answer that the trust sale was void, and that no suit could be maintained on the note until the security was exhausted, conflicted with a claim, also set up in such answer, that defendant was entitled to the profits realized from a resale of the property which defendant had purchased at the trust sale; and the granting of relief based on one of such claims would exclude the granting of that based on the other.

**Trust Deed.—A Deed of Trust to Secure a Debt, With Power of Sale** to be exercised after breach of the obligation which it is given to secure, is, in effect, only a mortgage with power of sale, such as is authorized by Civil Code, section 2932, and is within the policy of Code of Civil Procedure, section 726, providing that only one action can be maintained to enforce any debt or right secured by a mortgage, and that such action shall be the one therein prescribed, which contemplates a sale and exhausting of the security before any personal judgment can be rendered.

**Trust Deed.—The Trustees in a Deed of Trust to Secure a Debt,** who were apparently not interested in the debt at the time of the execution of the deed, subsequently, without the knowledge or consent of the grantors, became shareholders and directors in a corporation which thereafter purchased the debt. The corporation then had the property sold by the trustees, bought it in, and sold it again at a profit. Held, that the sale was voidable at the mere instance of the grantor, or, if affirmed by him, he was entitled to an accounting for the profits of the resale, and to credit therefor as of the time of the resale.

**Trust Deed.—The Assignee of a Note Secured by a Deed** of trust, who purchases the property at a sale under the deed of trust, cannot deny that the payee of the note, his assignor, accepted the deed of trust as security for such note.

APPEAL from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the Herbert Craft Company against Dollie L. Bryan in her own right, and substituted as administratrix

*For subsequent opinion in bank, see 140 Cal. 73, 73 Pac. 745.

for James M. Bryan, deceased. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Garter, Dozier & Wells for appellant; Coffman & Coffman for respondent.

TEMPLE, J.—This action was brought upon a promissory note executed by James M. Bryan and his wife, Dollie L. Bryan. Since the commencement of the action, James M. Bryan has died, and the case is continued against Dollie L. Bryan, as administratrix, and also against her personally. The note was executed by both husband and wife on the third day of June, 1893, for $10,000, with interest at the rate of nine per cent per annum, compounded annually. In the answer, as one defense, and in a cross-complaint, the defendant avers that on the eleventh day of December, 1893, James M. Bryan and Dollie L. Bryan executed for Herbert Craft, who was the payee in the note, a deed of trust conveying to George H. Craft and E. R. Craft, as trustees, certain lands as security for the payment of the note. The terms of the trust deed are stated in full in the pleadings. It is also charged that the note so secured by the trust deed was duly assigned to the plaintiff, the Herbert Craft Company, which is a corporation, and subsequently thereto, to wit, on the thirteenth day of June, 1896, the said trustees, in pursuance of the trust deed, sold the lands described and conveyed therein and thereby to the Herbert Craft Company for the sum of $10,000. It is averred that thereafter the corporation, acting through George H. Craft and E. R. Craft, sold the said lands to Martha B. Grinnell for $12,500. The defendant seeks an accounting, and claims the right to have the profit made by the Herbert Craft Company credited upon the indebtedness. This suit is brought to recover the sum which remains due on said promissory note after the sale by the trustees giving credit for $10,000, the amount realized from the sale by the trustees.

A feeling of doubt as to the remedy they were entitled to, if any, must have affected defendant's attorneys when the pleadings were drawn. The facts are apparently stated fully and in detail, and in the answer and cross-complaint the defendant insists that the sale to the Herbert Craft Company is void, and that she, or the estate, is entitled to

the profits realized. It is evident that the two demands cannot both be granted. The claim that the sale is void, coupled with the contention that no suit can be maintained upon the note until the security has been exhausted, is in the nature of a plea in abatement. The other is a proposal to affirm the sale to Mrs. Grinnell and a demand for the proceeds of the sale. The court, on motion of the plaintiff, struck out that part of the answer which sets up as matter of defense the facts concerning the trust and also the cross-complaint, and, of course, declined to receive evidence sustaining such defense or the cross-complaint. The questions raised on this appeal are whether such orders are erroneous.

It is said that the learned judge of the trial court based his ruling upon the proposition that a trust deed given to secure a debt is not a mortgage within the terms of section 726 of the Code of Civil Procedure, and therefore a personal action to recover the debt can be maintained without first exhausting the security. I think this was error, but, if the general proposition were admitted, it would not follow that in such a suit the debtor might not show that the trustees had conveyed the property to the creditor under such circumstances as would entitle him to an account of profits made, and have such profits credited on his debt. As to the main proposition, it is true section 726 of the Code of Civil Procedure in terms refers only to indebtedness secured by mortgage. But if a trust deed given as security for a debt can be treated as a mortgage, it must follow that it is within the policy established by section 726. That such deed may be so treated, and an action for foreclosure maintained upon it, was expressly held in Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490. Mr. Justice Harrison, speaking for the court, said: "An absolute conveyance of property by a debtor to his creditor, in trust that he may sell the same, and out of the proceeds discharge the debt, is, in effect, only a mortgage with a power of sale, and the grantee may treat it as such, and, instead of making a sale under the power, may go into a court of equity for a foreclosure and sale under a decree; and whenever such course is pursued his relation to the trust property is the same as that of a mortgagee in the foreclosure of an ordinary mortgage." That is, the mortgagee could, in case of such foreclosure, bid at the sale, and become a purchaser, although the deed authorized and directed

a sale made by himself as trustee. That a personal action cannot be maintained on a promissory note secured by a deed of trust until the security has been exhausted was decided in Powell v. Patison, 100 Cal. 236, 34 Pac. 677. It was said: "The claim that the court erred in rendering judgment against the defendants upon a promissory note secured by a deed of trust, and which was also sought to be foreclosed in this action (100 Cal. 234, 34 Pac. 676), must be sustained, for the reason that it is well settled on authority in this state that a personal action on a secured debt before the security has been legally exhausted is erroneous." The record in that case shows that the point was fully argued on both sides. In fact, judging from the briefs, it was the only question presented by the appeal. The question is discussed in 1 Jones on Mortgages, section 62. The learned author says that such a trust deed is, in effect, a mortgage. It is a conveyance of land for the payment of a debt. "It passes the legal title to the grantee just as a mortgage does, except in those states where the natural effect of a mortgage is controlled by statute." The author points out that in Wisconsin it was held that such a trust was void, as one prohibited by statute. Subsequently this ruling was reversed, and such deeds were held to be valid as mortgages: Marvin v. Titsworth, 10 Wis. 320. The author points out a distinction between a deed of trust to secure a debt, and a trust to pay debts, in that the latter contains no defeasance. Of course, if the direction for a sale is mandatory, and to be had at all events, there is no place for a defeasance; otherwise, whether expressed in the deed or not, section 871 of the Civil Code constitutes a pretty good defeasance. I think this is also the effect of Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813. The passing of the legal title in such case is mostly ideal. It is deemed to have passed only for the purpose of enabling the trustee to convey a title. In all other respects the title remains in the trustor, and is still the right by which he holds that which is his. This court, in Bank v. Alcorn, felt constrained to hold such deeds valid as security. So far only was it necessary to go. The court must not be thought to have recognized a trust expressly prohibited by statute, and to have reversed the policy of the state as declared in section 726 of the Code of Civil Procedure. One exception to that rule is recognized in section 2932 of the

Civil Code, and in all its essential elements and consequences a deed of trust given to secure a debt comes within that exception, and it was so declared in the case last cited. At all events, we would not feel warranted in overruling Powell v. Patison, supra. The case of Koch v. Briggs, 14 Cal. 257, 73 Am. Dec. 651, was in some respects the converse of this. It was there contended that the only remedy afforded a creditor so secured was to foreclose. The court simply held that the trust could be executed for the benefit of the creditor, and foreclosure was not necessary. If, beyond that, it was also said that foreclosure could not be had, so far it was obiter, and is in conflict with later cases. The provisions of section 4, article 13, of the constitution, may be deemed to add some force to the argument that a personal action cannot be maintained to recover the debts secured by a trust deed until the security has been exhausted. Not only is a deed of trust given to secure a debt classed with mortgages, but the creditor is permitted to pay in certain cases the taxes upon the interest of the trustor, and to secure their repayment a lien is given upon the interest of the trustor. This lien can only be enforced by the execution of the power or by foreclosure. To allow a personal action which could not include the taxes paid, and in some cases other expenses incurred, as authorized in the trust deed, would be a species of splitting up demands, which is not allowed.

As to the other contention—that defendant is entitled to an accounting, and to have credited upon the debt any profits made upon the purchase by the corporation plaintiff—that also must be sustained. Conditions somewhat similar were recently considered in the case of Copsey v. Sacramento Bank, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 204, and it was held that such a sale was not void, but was voidable; at least upon a showing of any unfairness or advantage taken. The facts in this case differ from the case there considered in at least one very important respect. There the facts in reference to the position and relation of the trustees to the creditor existed and were known to the trustor at the time the deed was made. Here the trustees were apparently impartial at the time, and wholly disinterested. They were trustees of an express trust, which is strictly within the provisions of the Civil Code in reference to the relation. Without the consent or knowledge of the trustors, they became

interested in the debt. They became shareholders and directors in the corporation plaintiff, which, subsequently to their becoming interested, purchased the indebtedness. As trustees they sold and conveyed the property which was the subject of the trust. The corporation was, of course, chargeable with knowledge of all the facts. Plainly, such sale was voidable at the mere instance of the beneficiary. In the case of Copsey v. Sacramento Bank it may be said that the beneficiary with full knowledge consented that the trustees should so deal with the subject of the trust. Such cannot be said of this case. Here the pleading was stricken out on the ground that it did not state a defense. Its averments for the purposes of review on appeal must be taken as true. Under such circumstances neither the trustee nor his vendee can be permitted to make a profit from the violation of duty on the part of the trustees. The defendant is therefore entitled to the accounting, and to have such profits, if any, credited upon the indebtedness as of the time such resales were made.

It is objected that the pleadings are insufficient to authorize such relief. All the necessary facts are stated in the answer and in the cross-complaint. Instead of a demurrer, a motion was made to strike the pleadings from the files. The ground upon which this motion was sustained was that a personal action can be maintained without reference to what had been done with the property conveyed in trust to secure the debt, and that such accounting could not be had in such personal action. Under the circumstances the defendant's counsel are excusable in not asking for leave to amend.

Upon the pleadings here considered it cannot be held that defendant is barred by laches.

The point is made that it is not averred in the answer and cross-complaint that Herbert Craft, the payee named in the note, accepted the trust deed as security. The plaintiff, as his assignee, having purchased at the trustee's sale, is in no position to make the point.

The judgment is reversed, and the cause remanded for further proceedings in pursuance of this opinion.

We concur: McFarland, J.; Henshaw, J.

## PATTERSON v. MILLS et al.*

Sac. No. 909; May 20, 1902.

68 Pac. 1034.

**Water Rights—Priority.—Where the Defendant Alleges, in an Action Involving** the priority of right to take water from a stream, that his ditches were constructed prior to those of plaintiff, at a time when the lands described in the complaint were vacant and unappropriated public lands, the failure to find on such allegation vitiates a verdict for plaintiff, as such facts would render defendant's right paramount to the right of plaintiff.

**Appeal.—Where the Evidence Relating to a Finding of Fact is Conflicting,** the finding will not be disturbed on appeal.

**Water Rights—Priority.—The Evidence in an Action** to determine the priority of right to divert the waters of a river claimed by plaintiff, who was a lower riparian owner, by adverse user, showed that plaintiff for a number of years had removed dams erected by defendant, but that the latter had rebuilt them. Plaintiff's ditches were originally constructed under a license from a former owner of defendant's lands, and had originally connected with the ditch of such former owner, and one of the ditches was constructed for the joint use of the parties. Held, insufficient evidence of adverse user to establish plaintiff's prior right.

**Water Rights.—Where a License to Construct a Ditch** is given on consideration that the ditch shall be for the joint use of the licensor and licensee, the right of the licensee to use the ditch can only be lost by abandonment.

APPEAL from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by J. R. Patterson against Robert Mills and another. From a judgment for plaintiff and from an order denying a new trial the defendants appeal. Reversed.

O'Neill & Butler and Warren & Taylor for appellants; Gillis & Tapscott for respondent.

SMITH, C.—The object of this suit is to determine the reciprocal rights of the parties to the waters of Shasta river, which flows in a general northeasterly course first through

*For subsequent opinion in bank, see 138 Cal. 276, 71 Pac. 177.

the lands of the defendants, and then through those of the plaintiff. The plaintiff recovered judgment, from which and an order denying a new trial the defendants appeal.

The plaintiff is the owner of two ditches heading on the defendants' land; the upper on the east, the lower on the west, side of the river. The upper ditch is alleged and found to be of a capacity of two hundred and fifty inches; the lower of one hundred and fifty (both measured, it will be understood here and elsewhere, under a four-inch pressure); and it is found by the court that for forty-five years or more (i. e., from the year 1855) the water of the river, when sufficient for both parties, has been habitually diverted and adversely used by the plaintiff and his grantors in the irrigation season to the full capacity of the ditches, and that when the water became insufficient (which was about the month of July each year) one-half of the water flowing in the river at the upper or south boundary of defendants' land was so diverted and used. The defendants are the owners of three ditches heading above those of the plaintiff, known respectively as the "Reese Ditch," the "Beaver Dam Ditch," and the "Stewart Ditch," which, it is alleged, were constructed the first two in the year 1853, the third in the year 1854, at which times all the lands described in the complaint were vacant, unappropriated public domain, and the plaintiff's ditches were not existing. The first, as constructed, was of the alleged capacity of two hundred, the second of one hundred, and the third of one hundred and fifty, inches. These ditches, it is alleged, have ever since continued to be of the same capacities, and by means of them the waters of the river were appropriated, and have ever since been diverted to the full extent of their capacities, and used on the lands now owned by the defendants, then occupied by their predecessors in title. The defendants also claim to be entitled to one-half the water flowing in the plaintiff's upper ditch, but this claim (which was rejected by the court) will, for the present, be left out of consideration. Thus it will be seen that the plaintiff claims four hundred inches of water when there is eight hundred inches or more in the river, and when there is less one-half; and that the defendants claim four hundred and fifty inches at all stages of the water. But it is alleged in the complaint and found that until the month of July of each year there is sufficient water to supply the claims of both parties, and

the controversy, therefore, relates only to the latter period of the year, when there is less than eight hundred and fifty inches of water in the river. The defendants' claim, as resting on an alleged prior appropriation, and therefore being prior in time, will be first considered.

With regard to this the court find that the Reese ditch was not constructed until 1885, and that the Beaver dam ditch was constructed "about the year 1855," and the Stewart ditch "about the year 1854 or 1855"; but that of the two last-mentioned ditches the former had a capacity of fifty, and the latter of one hundred, inches only. It is also found that the water diverted by these ditches is used to irrigate the lands of the defendants, and, in effect, that it has been used by the defendants and their grantors "since about the year 1854 or 1855." But there is no finding on the allegation of the answer that when the ditches were constructed the plaintiff's ditches were not in existence, and that the lands described in the complaint were vacant, unappropriated public domain. The findings, therefore, fail to dispose of a material and important issue in the case; for, if the allegation of the defendants is true, the defendants' predecessor, by his appropriation of the water, acquired a right to it paramount to the rights subsequently acquired by the plaintiff as riparian proprietor. The appellants also claim that the findings of the court as to the date of the construction of the Reese ditch, and as to the original capacity of the Beaver dam ditch and of the Stewart ditch, are not justified by the evidence. But the evidence on these points is, we think, conflicting, and the findings, therefore, cannot be disturbed.

The plaintiff's claim rests upon the finding of an adverse user, and another finding to the effect that the reciprocal rights of the parties, each to half of the water, have always been recognized by both. The latter finding has no support in the evidence, and may be disregarded. As to the other, it is clear that the finding cannot be maintained. The plaintiff testifies that during the last fifteen years (since the defendants have owned their lands), whenever the water was low in the river, he has habitually removed the dams of the defendants so as to let the water run down to his own ditch. But he also testifies that in all cases the dams were immediately replaced, and also that he did not know whether the defendants had any notice of his acts. His user, therefore,

has not been uninterrupted during that period: Jones, Easem., sec. 187. As to the preceding period, it appears that the plaintiff's ditches were constructed by his predecessor under license from Stewart, the then owner of the land, and his original entry was, therefore, not adverse. It seems also, with reference to the upper ditch, that it originally headed on the Stewart ditch, and not on the river, and that it was constructed, not only with the license, but for the joint use, of the parties, and that it was afterward thus used, at least until the coming of the plaintiff. The only testimony as to the quantity of water used during this period is the mere vague statement of the plaintiff that he used more than half of the water. But it appears that the predecessors of the defendants were at the same time diverting the water by the Beaver dam and Stewart ditches. We are of the opinion, therefore, that the plaintiff has wholly failed to sustain his claim to the quantity of water claimed by him.

With regard to the claim of the defendants to a joint interest in plaintiff's upper ditch, the testimony of Stewart is that the license for the construction of the ditch was given with the understanding that it should be for joint use; and this statement is natural and probable, and is not contradicted. Assuming, therefore, such an agreement, the rights of the defendants' predecessors and of themselves could be lost only by abandonment, of which there is no evidence (1 Bouv. Law Dict., "Abandonment"; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; 1 Notes Cal. Rep. 195; Ferris v. Coover, 10 Cal. 589), though there is some evidence of disuser. On the evidence as it stands, therefore, it would seem that the defendants still have a right to use the ditch, and it seems from the testimony of the plaintiff that during the last fifteen years this right has been constantly asserted by the actual, though interrupted, use of the water in the ditch. This agreement, however, related only to the use of the ditch, and did not affect the relative rights of the parties to the use of the water of the river. Nor do we think that these were affected by the judgment in the former suit of plaintiff against Stewart, pleaded as an estoppel.

We therefore advise that the judgment and order appealed from be reversed and the cause remanded for a new trial.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded for a new trial.

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## KLEEBAUER et ux. v. WESTERN FUSE AND EXPLOSIVES COMPANY.*

S. F. No. 2419; June 10, 1902.

69 Pac. 246.

**Nuisance.—The Maintenance of a Powder Magazine** wherein was kept five thousand pounds of gunpowder within two hundred and fifty yards of numerous dwellings was a nuisance per se.

**Explosion—Liability of Corporation for Act of Employee.**—A corporation keeping five thousand pounds of gunpowder in a magazine is liable for the damages occasioned to near-by dwellings by an employee maliciously setting fire to the gunpowder, the maintenance of the magazine being a nuisance.[1]

APPEAL from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Action by Frederick Kleebauer and wife against the Western Fuse and Explosives Company, a corporation. From a judgment in favor of the plaintiffs the defendant appeals. Affirmed.

Wright & Lukens for appellant; Reddy, Campbell & Metson for respondents.

*For subsequent opinion in bank, see 138 Cal. 497, 94 Am. St. Rep. 62, 60 L. R. A. 377, 71 Pac. 617.

[1] Cited in McGehee v. Norfolk & S. Ry. Co., 147 N. C. 151, 24 L. R. A., N. S., 119, 60 S. E. 915, where the court says: "The plaintiff fails to make a case of actionable negligence, because in respect to the conditions existing and the manner in which he sustained damage he shows no breach of a legal duty to him. It is by no means clear that the dynamite, stored as described in the complaint, was, in the ordinary acceptation of the term, a public nuisance."

Cited in the note in 113 Am. St. Rep. 1014, on the presumption of negligence from the happening of an accident.

COOPER, C.—This action was brought to recover damages for injuries to plaintiff's house, caused by reason of the explosion of a large quantity of gunpowder on defendant's premises. The case was tried with a jury, and a verdict returned for plaintiff, upon which judgment was entered. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order. The facts are substantially as follows: For several years prior to the explosion the defendant had been engaged in the business of manufacturing fuse, and had its plant and magazine in the village of Melrose. Within a radius of two hundred and fifty yards of the magazine there were many dwelling-houses, of which plaintiffs' was one, the vicinity being regularly laid out in streets. Defendant had in its magazine, immediately prior to the explosion, about five thousand pounds of gunpowder, being the amount it usually kept on hand. In the employ of defendant was a Chinaman, whose business it was to carry powder from the magazines to the hoppers, from which the powder was distributed. The Chinaman, during a quarrel with one of his countrymen, killed him, and then fled into the magazine to evade arrest. While the officers of the law were making an attempt to arrest him, he willfully, and with murderous intent, set fire to the magazine, exploding it, killing some of the officers and himself, and causing the injury to plaintiff's dwelling. The court below instructed the jury that if the defendant kept and stored in its magazine a large quantity of gunpowder in a thickly settled neighborhood, and so near thereto that its explosion was liable to injure persons, dwellings or other property in the neighborhood, the so keeping said powder was a nuisance; and the jury, by its verdict, found by implication that it was a nuisance.

It is settled by the great weight of authority that the keeping of a dangerous explosive, such as gunpowder or nitroglycerine, in large quantities, in a public place, or in close proximity to buildings inhabited by human beings, is a nuisance per se: Webb, Pol. Torts, note on page 503, and cases cited; Cheatham v. Shearon, 1 Swan, 213, 55 Am. Dec. 734; Myers v. Malcolm, 6 Hill, 293, 41 Am. Dec. 744; Chicago etc. Coal Co. v. Glass, 34 Ill. App. 364; Weir's Appeal, 74 Pa. 230; McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508. In the latter case it is said: "The keeping of gunpow-

der, nitroglycerine, or other explosives, in large quantities, in the vicinity of a dwelling-house or place of business, is a nuisance per se, and may be abated as such by action at law or injunction in equity." And in this case the question was properly left to the jury under appropriate instructions: Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; Rudder v. Koopman, 116 Ala. 333, 37 L. R. A. 489, 22 South. 601. Therefore the defendant was guilty of maintaining a nuisance in keeping the large quantity of powder in so populous a neighborhood.

Is it liable to plaintiff for damages caused by the explosion, that being caused by the criminal act of the Chinaman? We are of opinion that it is, and the fact that the Chinaman, by his act, was the direct cause can make no difference. The fact that defendant maintained the nuisance was a violation of legal duty. If it had not maintained the nuisance, the damage would not have occurred. Powder is regarded by all the authorities as a destructive agent, liable to explosion by contact with the smallest spark, and often by the elements. The maxim, "Sic utere tuo ut alienum non laedas," applies. The plaintiffs had the right to the free use and enjoyment of their property. The defendant, in maintaining the nuisance upon its own land, for its own profit, caused the damage. The thing constituting the nuisance was the property of defendant, the Chinaman its servant, and, although he turned aside from his employment in setting fire to the powder, yet the defendant, on principles of public policy, must be held liable. The defendant's violation of legal duty and willful disregard of the property rights of others indirectly caused the damage. The principle is correctly stated by Mr. Justice Blackburn in Fletcher v. Rylands, 1 Ex. 265: "We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. . . . . But for his bringing it there, no mischief could have accrued, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law whether the things so brought be beasts, or water, or filth, or stenches."

This language was repeated and approved by Lord Cranworth on appeal: 3 H. L. Cas. 330. The same reason applies to explosives. The party bringing upon his premises, in the vicinity of other dwelling-houses, large quantities of powder or other explosives, does so at his peril. In this case, if the defendant had not brought and kept the powder on its premises, the Chinaman could not have exploded it. In 1 Hale P. C. 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequences of his being loose is that he will harm men, the owner "must at his peril keep him up safe from doing hurt, for, though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." We can see no difference in principle whether the thing be an animal or a dangerous explosive. The defendant knew the nature of the thing kept, its liability to explosion, and it kept it at its peril. The American authorities, with hardly an exception, follow the doctrine laid down in the courts of England. It is said in 1 Wood on Nuisance, third edition, page 183: "So the keeping of gunpowder, nitroglycerine, damp jute, or other explosive substance, in large quantities, in the vicinity of one's dwelling-house or place of business, is a nuisance, and may be abated as such by action at law, or by injunction from a court of equity; and, if actual injury results therefrom, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence." In the case of Heeg v. Licht, 80 N. Y. 581, 36 Am. Rep. 654, the powder in defendant's magazine exploded from an unknown cause. The action was for damages caused by the explosion. In the opinion the court said: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might, in some localities, render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business when free from negligence has no application." In a later case (Prussak v. Hutton, 30 App. Div. 66, 51 N. Y. Supp. 761) the powder magazine was so near to dwelling-houses that it was held to be a nuisance per se, and the owner liable, although the explosion was caused by lightning. The court said: "The defendants at least were not free from fault

which co-operated to produce the result." In another case by a different plaintiff for damage caused by the same explosion (Cibulski v. Hutton, 47 App. Div. 107, 62 N. Y. Supp. 167) the court again affirmed the rule, saying: "The recovery was not placed upon the ground of defendants' negligence, but upon evidence sufficient to support the finding of the jury that the powder-mill, in the place where it was situate, with reference to the dwelling in which the plaintiff in that case was injured, was a nuisance." In Chicago etc. Coal Co. v. Glass, 34 Ill. App. 364, the damage was caused by an explosion of the powder magazine by lightning, and the defendant was held liable. The court said: "We do not think it necessary that the proof should show any immediate and direct agency on the part of the appellant causing the injury, when the original or primary cause was the establishment of a public nuisance by it." In a later case (Laflin etc. Powder Co. v. Tearney, 131 Ill. 325, 19 Am. St. Rep. 34, 7 L. R. A. 262, 23 N. E. 390), in which the explosion was caused by lightning, the court said: "As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury result from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence." In Cheatham v. Shearon, 1 Swan, 213, 55 Am. Dec. 734, the defendant was held liable for damages by the explosion of a powder magazine by lightning. The court said: "The fact that it is liable to explode by means of lightning, against which no human agency can guard, is decisive of the question." In Wilson v. Phoenix Powder Co., 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035, the cause of the explosion was unknown, but the defendant was held liable, and the court said: "Was the defendant maintaining a public nuisance? If it was, it was engaged in the commission of a public wrong, and, injury resulting therefrom to the plaintiff, the defendant must repair such injury." And further, in the same opinion: "If damage happen to a person from explosion, the injured party is entitled to compensation without proving negligence on the part of defendant. He is injured by that which breaks the law made for his protection—the law against public nuisance. He is in no fault, while the other man is, and he has received damages from that other man's wrongful act. He has a right

to immunity from this injury, and the other man owes him the duty of securing him immunity." In a very late case in Ohio (Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 60 Ohio St. 560, 71 Am. St. Rep. 740, 45 L. R. A. 658, 54 N. E. 528), the question is elaborately discussed, and it was held that one who stores nitroglycerine on his own premises is liable for injuries to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage nor is chargeable with negligence contributory to the explosion. In Hazard Powder Co. v. Volger, 58 Fed. 153, 7 C. C. A. 130, defendant was held liable for damages caused by the explosion of its powder magazine from an unknown cause. It was said: "It is liable for the injuries resulting from its explosion from any cause, because its location under the ordinance made it a nuisance." In Myers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744, the defendant was held liable where the explosion was caused by the building in which the powder was stored taking fire. The court said: "The situation of the building was such as to render the gunpowder dangerous to the lives of the citizens, for an explosion, either by accident or design, at any period of time after the deposit, would in all human probability have proved destructive to more or less of the inhabitants residing in the neighborhood." In McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508, the damage was caused by the explosion of blasting materials from an unknown cause; and the chancellor, in delivering the opinion, held that depositing such materials in the vicinity of a dwelling-house is a nuisance per se, and that, if injury results therefrom, the person so keeping them is liable, "even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence." It is said in Webb's Pollock on Torts, American edition, page 615: "The risk incident to dealing with fire, firearms, explosives, or highly inflammable matters, corrosive or other dangerous or noxious fluids, and (it is apprehended) poisons, is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term 'consummate care' is used to describe the amount of caution required, but it is doubtful whether even this be strong enough. At least we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's

part was held to exonerate him." It is a maxim of our law "that no one should suffer by the act of another": Civ. Code, sec. 3520. In this case, if the plaintiffs, whose property was injured, must suffer, it would, at least to some extent, be by the act of the defendant. The defendant, by its acts in bringing and storing the large quantity of powder near plaintiffs' property, violated the law. Such violation of law, together with the act of the Chinaman, caused the damage. It is claimed that this is a very singular case, and the only one of the kind in the books, and that it should be distinguished from the lightning cases, because it is possible to so insulate a powder magazine that lightning would not strike it. It would have been possible for defendant to have kept matches from the person of the Chinaman while working around the powder magazine. It would have been possible, and it was defendant's duty, to keep its magazine in such locality that, if it exploded, it would not have injured the plaintiff's property.

It follows that the judgment should be affirmed.

We concur: Gray, C.; Smith, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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## PEOPLE v. FELIZ.

Cr. No. 863; June 11, 1902.

69 Pac. 220.

**Larceny—Instructions.—On a Prosecution for Grand Larceny,** an instruction that if defendant was not present when the alleged crime was committed he was not guilty was properly refused, as aiding and abetting the crime would have rendered defendant guilty as a principal.

**Criminal Law—Alibi.—Where the Court Instructed That,** if the evidence tended to establish an alibi, to the extent that it raised a reasonable doubt as to defendant's guilt, he should be acquitted, and gave other correct instructions on the subject, the refusal to instruct that, if the jury entertained a reasonable doubt as to the sufficiency

of the evidence to establish an alibi, defendant should be acquitted, was not reversible error.

**Larceny—Instructions.—Where, on a Prosecution for Grand Larceny,** there was evidence connecting defendant with the commission of the crime other than the mere fact of his presence and failure to interfere with the commission thereof, the refusal to instruct that the mere fact that one is present when a larceny is committed, and makes no attempt to prevent it, does not render him guilty of the crime, was not prejudicial error.

APPEAL from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Frank Feliz was convicted of grand larceny and he appeals. Affirmed.

William Graves and Louis Lamy for appellant; Tirey L. Ford, attorney general, and A. A. Moore, Jr., deputy attorney general, for the state.

CHIPMAN, C.—Defendant was convicted of the crime of grand larceny, to wit, the stealing of a cow and heifer. He appeals from the judgment and the order denying his motion for a new trial. The errors complained of by defendant relate exclusively to the refusal of the court to give certain instructions requested by defendant. It seems to be conceded that the evidence justified the verdict.

1. The court refused the following instruction: "If you believe from the evidence that the defendant was not present at the time it is alleged that the crime was committed, you must acquit him." This was not error. Defendant may have aided and abetted the crime without being personally present when the animals were stolen. One who aids and abets in the commission of a crime becomes a principal: Pen. Code, sec. 31. See, also, People v. Roberts, 122 Cal. 377, 55 Pac. 137, cited by both parties. The instruction might have misled the jury in the form requested.

2. The court refused the following instruction: "If you entertain any reasonable doubt from the evidence as to the sufficiency of the said evidence to establish an alibi in this case, it is your duty to resolve such doubt by an acquittal of the defendant," citing People v. Roberts, supra, and some other cases. The court instructed the jury that, "if the evidence

offered tends to establish an alibi to the extent that it is sufficient to raise a reasonable doubt in your minds as to defendant's guilt, then you should acquit him." The court further instructed the jury in accordance with the views expressed, and nearly in the language found, in People v. Roberts. It was not error to refuse the instruction asked, for the reason that the jury were properly and clearly instructed on the subject. The same may be said as to the instructions refused relating to the testimony of an accomplice. The court went into the law on this feature of criminal trials quite fully, and, we think, correctly stated the law. An error in refusing an instruction is cured if the instruction refused is elsewhere given substantially. The court is not required to repeat its instructions.

3. The court refused to give the following instruction: "The mere fact that one person is with another when a larceny is committed, and knows that property has been stolen, and makes no interference on his part to prevent the larceny, does not render him guilty of the crime." If the facts and circumstances of this case were such as to make the instruction applicable, it might have been proper. But there were facts and circumstances other than the one mentioned tending to connect the defendant with the commission of the crime charged. Instructions should always be given with reference to the facts proved to the jury: People v. Byrnes, 30 Cal. 206. It would tend to mislead or confuse the jury for the court to single out a fact from a chain of facts, and instruct that such fact alone was insufficient to warrant a conviction, without some reference to other facts, or some qualification that would avoid any misinterpretation of the instruction by the jury. While the instruction, as requested, may be correct, we do not think it was prejudicial error to refuse to give it to the jury in view of the facts shown by the record. These remarks apply with equal force to the instruction immediately following the one just noticed.

The judgment and order should be affirmed.

We concur: Cooper, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

## PEOPLE v. TAYLOR.

Cr. No. 869; June 12, 1902.

69 Pac. 292.

**Larceny.—Evidence Examined, and Held to Sustain** defendant's conviction for grand larceny.

**Larceny—Evidence.—In a Prosecution for Grand Larceny** of a watch, evidence that defendant, within two minutes after he had been seen with the prosecutor, also had his cane, was admissible as tending to show that the parties were together, and not objectionable as tending to prove another crime.

**Larceny—Evidence.—In a Prosecution for Grand Larceny,** testimony by the officer arresting defendant that he had a conversation with a party who had seen defendant and the prosecutor together, even if material, was not prejudicial, the contents of the conversation not being given.

**Larceny—Res Gestae.**—In a prosecution for grand larceny of a watch, where a witness testified that, as he passed defendant and prosecutor, he noticed the prosecutor's watch and chain, and that two minutes later he saw defendant leave the prosecutor, his further testimony that he then noticed prosecutor's vest was unbuttoned, and the watch and chain gone, was admissible as part of the res gestae.

APPEAL from Superior Court, San Joaquin County; Edward I. Jones, Judge.

J. W. Taylor was convicted of grand larceny and appeals. Affirmed.

Jacobs & Flack for appellant; Tirey L. Ford, attorney general, and A. A. Moore, Jr., deputy attorney general, for the people.

CHIPMAN, C.—Defendant was convicted of the crime of grand larceny. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The complaining witness, an old man named Clark, resided at the state hospital, near Stockton. He came to that city on September 3, 1901, to view a circus parade. He wore a watch and chain at the time and carried a cane, and he testified that he looked at the watch at the hour of 10:30 A. M.

He went into a saloon at that time and had a drink, and thenceforward he knew nothing of what happened to him the remainder of that day. He recovered his senses the next morning, and found himself in jail, without his watch or chain. His cane, too, was gone. In the afternoon of September 3d the witness Gengo saw Clark and defendant walking past witness on Weber avenue, or, as witness described it, saw defendant dragging Clark along, arm in arm. Witness saw the chain of the watch hanging from Clark's vest as they passed, and noticed that Clark had a cane. Witness saw defendant brushing or rubbing Clark's vest as they passed, and heard defendant remark, "That's right, old man," or some such expression. Two or three minutes later, witness saw defendant returning from where Clark was left, and noticed that defendant had the cane carried by Clark. Almost immediately after defendant passed, witness called Officer McDiarmid, who followed defendant and took him into custody within a few minutes. On their way to the police office, defendant admitted having the watch, and attempted to bribe the officer to release him. On reaching the courthouse, McDiarmid turned defendant over to Officer Finnell to be searched. Finnell first asked defendant if he had the watch, and defendant denied having it. He then made a search, but failed to find anything; and, upon being assured by McDiarmid that the watch was somewhere on defendant's person, Finnell made further search, and found the watch and chain in an outside coat pocket, under a handkerchief. Defendant also had Clark's cane when arrested. Witness Gengo saw Clark immediately after defendant left Clark and passed witness with the cane, and he noticed then that Clark's vest was unbuttoned. There was no evidence introduced on behalf of defendant. Without stating further the evidence in the case, we think there was enough to warrant the jury in finding a verdict of guilty.

2. It is contended that it was error to admit evidence as to the cane, and in admitting the cane itself. It is true, as contended, there was no charge that defendant had stolen the cane. The purpose of proving its possession by defendant within two minutes after he was seen walking with Clark and when he was leaving Clark was as a circumstance showing that they were together, and not to prove the commission of

another crime. I suppose, if defendant had been seen wearing Clark's coat that he had on a minute or two before, it would have been admissible as tending to corroborate Gengo's testimony, and would also have tended to contradict defendant, who stated to the arresting officer that he did not know Clark. Defendant cites People v. Smith, 106 Cal. 73, 39 Pac. 40, holding that it is not admissible to prove other crimes than that with which the defendant is charged, and this may be conceded to be the rule. It cannot be reasonably supposed, however, that the jury regarded defendant's possession of the cane as evidence of his having committed another crime, and for that reason would the more likely believe he had committed the crime charged. As a circumstance closely connected in point of time with the parties and with the taking of the watch, it was admissible as showing the relation of the parties.

3. It is urged as error that the witness McDiarmid was permitted to testify that he had a conversation with the witness Gengo. The conversation was not asked for, nor was it narrated—any part of it. What Gengo told the officer, we do not know. All we know is that, immediately after Gengo saw defendant passing, he spoke to the officer, and the officer followed defendant and arrested him. We can discover no possible prejudice to defendant in this circumstance, nor can we see that it was error to show it. The jury must have supposed the officer got his cue somehow, and although it was, perhaps, immaterial how he got it, the evidence could not have affected the minds of the jury to defendant's prejudice.

4. It is urged as error that testimony was admitted to show the condition of Clark's vest after the alleged larceny took place, the defendant not being present at the time. Gengo testified that, as Clark and defendant passed him, he noticed the watch chain, and also noticed that Clark's vest was buttoned. Two minutes later he saw defendant going away from Clark, and he then noticed that Clark's vest was unbuttoned, and the watch and chain were gone. He had seen defendant with his hands on Clark's vest as he passed. These circumstances were all so nearly connected in point of time—practically simultaneous—that they were res gestae. The offense was committed on the person of Clark, and we think the condition of his vest, in which rested the watch,

was as admissible as his condition as to sobriety or insensibility to what was going on around him.

The judgment and order should be affirmed.

We concur: Cooper, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

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## GARDNER v. STARE et al.*

L. A. No. 1060; June 21, 1902.

69 Pac. 426.

**Trustee's Account.—Where the Record on Appeal from an Order Sustaining** objections to a trustee's account does not show the evidence on which it was based, the decision will be affirmed, as all presumptions are in favor of the action of the trial court.

**Appeal—Effect on Jurisdiction of Trial Court.**—An appeal from an order does not devest the trial court of jurisdiction to make subsequent orders in the cause, but, at most, is only matter in abatement.

**Trustee's Accounting.—An Appeal, in a Proceeding** against a a trustee to compel an accounting, from an order relating to the account before a certain date, does not preclude the trial court from making an order in reference to the trustee's accounts subsequent to such date.

APPEAL from Superior Court, Los Angeles County; M. T. Allen, Judge.

Suit by William Gardner against Catherine Stare and others. From an order in favor of plaintiff, defendant Adeline Johnson appeals. Affirmed.

C. N. Wilson and Leslie R. Hewitt for appellant; Dunnigan & Dunnigan, Cole & Cole, Fred L. Wood, Graves, O'Melveny & Shankland and Goodrich & McCutcheon for respondent.

*For subsequent opinion, see 135 Cal. 113, 67 Pac. 5.

COOPER, C.—On the eighteenth day of October, 1899, a citation was duly issued and served upon Mrs. Adeline Johnson, one of the defendants, directing her to make a report to the court, and an accounting of all matters connected with the trust estate, of which she was trustee, since the filing of her last account, September 1, 1898. The account was accordingly made and filed, and written objections were made to certain portions of it. After hearing, and on July 30, 1900, the court made an order sustaining some of the objections to it, and directed that, as corrected, it be approved and allowed. This appeal is from the said order.

There is no bill of exceptions or authenticated statement of the evidence in the record. In such case all presumptions are in favor of the order of the court below, and we cannot disturb it: In re Scott's Estate, 128 Cal. 580, 61 Pac. 98.

Appellant, if we understand her brief, contends that the court had no jurisdiction to make the order because it had in February, 1899, made a certain order or decree in the same entitled matter, and that an appeal was pending in this court from the order so made at the time the order in the case at bar was made. The fact that an appeal was pending from a prior order made in the same case would not deprive the court of jurisdiction in the matter of making the present order. At most, it would only have given the appellant the right to plead in abatement the pendency of the prior proceeding or the bar of the prior judgment; but no such plea was made, and there is nothing in the record to show that such issue was in any way before the court. The copy of the prior order is, however, printed in the record, and we have examined it, and find that it only included the account of appellant as trustee up to September 1, 1898. This order or decree was affirmed here: Gardner v. Stare, 135 Cal. 118, 67 Pac. 5. The present order is confined to matters accruing after September 1, 1898, and takes the balance as found in the prior order as a basis. Hence the prior order in no way settled or determined the account of appellant as trustee after September 1, 1898.

It follows that the order should be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

## BALLARD v. NYE et al.

L. A. No. 1145; July 7, 1902.

69 Pac. 481.

**Mortgages—Payment — Insurance — Agency.**— Defendants executed a mortgage to plaintiff, the insurance on the building being made payable to her. The building burned, and the person who had acted as agent for defendants in negotiating the loan wrote her for the mortgage, to use in adjusting and collecting the insurance. She refused to send the mortgage to him, but sent it to N.—one of the defendants. After the insurance was adjusted, N. wrote her that the company had the money, which could not be turned over to anyone but herself, and sent her a sum sufficient, with such insurance money, to pay the mortgage. She answered, acknowledging receipt of the money sent, and that she would soon go to the city to receive the insurance money. When she went, N.'s wife stated that he was absent, and referred plaintiff to such former agent. When she went to him, he took her to a bank, and directed a transfer from his account to hers of a sum $200 less than the insurance money, and, on her objecting to the amount, stated that the balance would be paid in a few days. She thought she was dealing with the agent of defendants, and made no inquiry as to how he came by the money, and did not know that, pretending to act as her agent, he had surrendered the policy, received and receipted for the check in her name, and forged her indorsement thereto. Civil Code, section 1478, provides that "performance of an obligation for the delivery of money only is called payment." Held, that the insurance money was simply additional security for the debt, and that there had been no payment of the debt, except as to the money actually received by plaintiff.

**Mortgage—Payment—Insurance—Agency.—The Receipt, Without Inquiry,** of a part of the insurance money from the one who had pretended to act as plaintiff's agent, and without notice or knowledge that he had so acted, was not a ratification of his acts.

**Mortgage—Payment—Agency—Innocent Sufferers.**—Defendants were familiar with such pretended agent's disposition to keep things which did not belong to him, and having placed the policy and mortgage in his hands after the mortgage was sent to them by plaintiff, and thereby enabled him to get control of the money, should be the sufferers, rather than plaintiff, under Civil Code, section 3543, providing that, when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.

APPEAL from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Stella Ballard against Charles W. Nye and others. From a judgment for defendants and from an order denying a new trial plaintiff appeals. Reversed.

Wm. Mattoon, W. H. Savage and M. C. Hester for appellant; Hunsaker & Britt for respondents.

GRAY, C.—This is an action for a balance of some $200, besides interest, due on a promissory note, and to foreclose a mortgage given by the above-named defendant and his wife, also a defendant herein, to secure the payment of said note. The trial court found that the note had been entirely paid, and gave judgment for defendants. The plaintiff, contending that the finding of payment is contrary to the undisputed evidence, appeals from the judgment and from an order denying her a new trial.

The defendants Nye and his wife duly executed the note and mortgage sued on to the plaintiff. Some six months thereafter a house included in the mortgage was burned. Upon this house defendants had previously procured an insurance policy for $1,000 which policy was by indorsement thereon made payable to the plaintiff, as mortgagee," as her interest may appear." After the fire the insurance company adjusted the loss and allowed plaintiff $719.44 on account thereof. On the same day of this allowance Nye wrote from San Francisco to plaintiff, at Los Angeles, telling her of the allowance, and that the money was in the hands of the insurance company for her, and could not be turned over to any person but herself, and inquired of her if he should request the insurance company to send her money or draft to her at Los Angeles. He also inclosed a money order for $30 to her, and stated in the letter that this amount, together with the amount which the insurance company had retained for her, would pay the note and mortgage in full. Soon thereafter the plaintiff wrote to Nye, acknowledging receipt of the money order, and stating that she was coming up to San Francisco before long, and that the money could remain as it then was until she came up, when she would attend to the matter herself. Some three months later plaintiff went to San Francisco and called on the Nyes. Mr. Nye was not at home, but Mrs. Nye stated to her that she would have to see a Mr. Hayford about her money; that Nye had nothing more

to do with it; and Mrs. Nye directed her where to find Mr. Hayford. This Mr. Hayford had previously acted as agent of the Nyes in negotiating the loan from plaintiff on the note and mortgage; and, soon after the fire occurred, Hayford wrote to plaintiff from San Francisco to send him the mortgage, that the insurance company might be able to see what her interest was in the property. In response to this letter she sent the mortgage to Mr. Nye, thus declining to send it to Hayford, as he had requested. In pursuance of the directions received from Mrs. Nye, plaintiff found Hayford, and asked him about her money; and, after several days' delay, Hayford took her to the Union Trust Company's Bank, and requested an officer of the bank to transfer from his (Hayford's) account to her account $520. She said to him that that amount was not all that was due her, and that she wanted it all. He admitted that there was something like $200 more due her, but made some excuse for not having it all paid at that time, and said that the balance would be paid her in a day or two. The plaintiff did not know or understand how the money came to be in the bank in Hayford's name instead of in her own name, but supposed that he was in some way acting for the Nyes in paying the money. She had given Hayford no authority to act as her agent in any way, and, did not then know that Hayford had assumed to act as her agent, and had drawn the money allowed her by the insurance company, and given them a receipt in her name. All this, however, Hayford had done. She knew that this was a part of the insurance money allowed her, but how it came into the hands of Hayford she seems not to have known, but supposed, as appears from her testimony, that he was handling it as the agent of the Nyes. Plaintiff testifies that she did not agree to release the Nyes from the balance that was unpaid, and never agreed to look to Hayford for such balance. She made no inquiry as to where Hayford got the money. She made several efforts thereafter to get the balance of the money from Hayford, but failed, and thereafter made demand upon the Nyes, and on their failure to pay, brought this action. Plaintiff seems to have misunderstood the purport of Nye's letter to her wherein he stated that the money was with the insurance company, for she testifies: "When I went with Hayford to the bank, I supposed the money that had been allowed me on the policy by the insurance company

had been deposited in the bank in my name, and I expected to receive it at the bank, and to give to Hayford, as attorney for Nye, the note and release of the mortgage." She also testifies directly to the effect that Nye told her in his letter that the insurance money was in a bank in San Francisco for her; but it is clear that in this regard she must have misunderstood the letter, for the money appears not to have been placed in a bank for her, except the amount transferred by Hayford to her account. The above-recited facts appear from the evidence without substantial conflict, and these are all the facts material to the question of payment. It is earnestly contended by appellant that these facts do not warrant the finding of payment, except as to the money actually received by plaintiff. We agree with this contention.

1. As is stated in respondents' brief: "The indorsement on the policy, making the loss payable to the plaintiff as her interest might appear, operated as an assignment of the policy to her, authorized her to collect the money in case of loss, and to bring suit thereon in her own name. It conferred on plaintiff precisely the same right and interest in the policy which she would have had if, without such words, the mortgagor had assigned the policy to her as collateral security for the mortgage debt." Appellant stood then, after the fire, in the position of a creditor with her claim doubly secured; and it must be presumed that she remained in this position until it is shown either that the claim was in fact paid and satisfied, or that she consented to alter her position. Her correspondence with Nye is not evidence of any agreement to discharge the mortgage and look only to the insurance company for her money, because no such thing is even intimated in either Nye's letter or in appellant's reply thereto. Nye's letter gave her no new rights against the insurance company. She had a right of action against it for her money to the extent of its liability, as she well knew before she received that letter, and she had nothing more or less than that after she received it. The company had not agreed, so far as the evidence goes, to hold the money as her agent, nor did she agree that it should be treated merely as her agent, with her money in its hands. Her letter goes no further than to manifest a purpose to personally collect her claim from the company. She had a right to look to one or both these securities for payment of her claim as she saw fit. It was natural and proper

that she should look first to the insurance company to the full extent of its liability, and by so doing she waived no right against the other security. Section 1478 of the Civil Code defines "payment" as follows: "Performance of an obligation for the delivery of money only is called payment." The delivery of money to plaintiff is not shown by the correspondence referred to, nor is anything equivalent thereto made to appear thereby.

2. Nor do we think there is anything in the evidence to show that appellant intended to ratify the assumed agency of Hayford in drawing and receipting to the insurance company for the money in appellant's name. As to this matter, respondents say: "But it is immaterial whether the plaintiff, at the time she accepted the $520 from Hayford, did in fact know that Hayford had received the check from the insurance company, forged her indorsement, and cashed it. She was aware that she alone had the right to collect the money from the insurance company. She knew that the money which she received from Hayford was a part of the insurance money, and that he transferred it from his account to her account. She ought to have known how Hayford obtained the money. As she accepted it from him without inquiry, her acts constitute a valid ratification. Ignorance which is intentional or deliberate will not defeat the principal's ratification. From this evidence the court might well have found that plaintiff meant to take upon herself, without further information, responsibility for the conduct of Hayford, and to adopt all his acts." A careful examination of the evidence leads us to think that it does not support the conclusions reached in the quoted statement. Why should she suppose that Hayford was acting or had assumed to act as her agent, when from the beginning he had admittedly acted as agent of her debtors? He had not only negotiated the loan for them, but when the fire occurred he had written her for the mortgage, to all appearances as the agent of the Nyes or the insurance company, or perhaps for both. That Mrs. Nye referred appellant to Hayford in the absence of Nye is not disputed. It was not unreasonable for a woman in appellant's position to suppose that Hayford, having received the money as the agent of her debtors, had deposited it temporarily in the bank in his own name, until such time as he could make actual payment of it to the creditor, and receive satisfaction of the

mortgage, and take from her the note for cancellation. Why should appellant have thought or presumed that Hayford had committed the crime of signing her name without authority, that he might get into his possession money that he had no right to possess? For appellant to think that she was treating with the agent of her debtors when she received the money from him at the bank was perfectly reasonable, and consistent with all the circumstances of the case as they appeared to her at the time—and there is nothing to cast discredit on or contradict her sworn statement that at that time, and until long after the commencement of this action, she had no knowledge of Hayford's previous unauthorized acts. In using Hayford as their agent in negotiating the loan, and in subsequently referring her to him without notifying her that he was no longer their agent, respondents made it possible for appellant to be deceived by him; and they should not thereafter be heard to say: "You ought to have known that he was not acting as our agent, but as your agent. You should have inquired and ascertained whether things were in fact as we had made them appear to you." The argument of respondents seems to concede that knowledge of the facts of pretended agency or its equivalent is a necessary condition of a valid ratification of such agency. "To constitute a ratification the principal must be acquainted with that which has actually been done": Dean v. Bassett, 57 Cal. 640. "Before ratification can be inferred, such knowledge must be shown": Maze v. Gordon, 93 Cal. 61, 30 Pac. 962. It was not sufficient that appellant knew that Hayford had received money that was coming to her from the insurance company, but it should have been shown that she knew or ought to have known that he acted as her agent in the matter. The evidence showing as it does without conflict that appellant had no knowledge of the previous unauthorized acts of Hayford, and that her want of knowledge was in no way attributable to any negligence on her part, the finding of payment as to any amount in excess of $550 cannot be upheld on any theory of the agency of Hayford being created by subsequent ratification. The finding of payment is for these reasons in direct contradiction of the evidence.

It is recited in the receipt given by Hayford to the insurance company in the name of appellant that "in consideration of said payment said policy is surrendered to said com-

pany for cancellation, and all further claim by virtue of said policy forever waived." This would indicate that Hayford had received the policy from the respondents, and had surrendered it to the insurance company. He could not have received the policy from appellant, for the evidence shows without dispute that she never had it. The strong probabilities are, also, that Hayford obtained the mortgage from Mrs. Nye, and that it was by reason of his possession of the policy and the mortgage, both doubtless obtained from respondents, that he was enabled to deceive the insurance company into thinking that he was the authorized agent to receive and receipt for the money. At the same time the Nyes seem to have been familiar, from personal experience, with Hayford's disposition to keep things that did not belong to him. If these facts did not furnish a good ground for invoking the maxim that, "where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer" (Civ. Code, sec. 3543), they at least tend to render more satisfactory to the court the general conclusion already stated.

On the strength of the foregoing conclusions, it is also apparent that the court erred in admitting in evidence the check and receipt to which the name of appellant had been signed without authority.

The judgment and order appealed from should be reversed.

We concur: Cooper, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

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## GREEN v. LOS ANGELES TERMINAL RAILWAY COMPANY.*

L. A. No. 1056; July 8, 1902.

69 Pac. 694.

**Railroad Crossing—Contributory Negligence.—Deceased, When Within Thirty Feet** of the railroad, stopped, looked up the track, and

*For subsequent opinion in bank, see 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 719.

found it clear for a space of eight hundred feet. She then, without again stopping or looking up or down the track, proceeded to cross, and was struck by a train running between twenty-five and thirty miles an hour. Held, that deceased was not guilty of contributory negligence as a matter of law.[1]

**Railroad Crossing—Contributory Negligence—Appeal.**—In an action against a railroad for an accident causing death, a finding that there was no contributory negligence on the part of deceased will not be set aside unless such negligence affirmatively appears as a conclusion of law from the undisputed facts.

APPEAL from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Joseph Green against the Los Angeles Terminal Railway Company for damages for the death of his wife. From a judgment for plaintiff and an order denying a motion for a new trial defendant appeals. Affirmed.

Gibben, Thomas & Halstead and Goodrich & McCutchen for appellant; R. A. Ling and Edwin A. Meserve for respondent.

SMITH, C.—This is a suit brought by the plaintiff to recover damages for the death of his wife, alleged to have been the result of the negligent operation of the defendant's railroad. The plaintiff recovered judgment for the sum of $5,000 and costs; and the appeal is from the judgment, and from an order denying the defendant's motion for new trial.

It is found by the court that at the time of the accident the defendant's train "was being run and operated in a very dangerous and grossly negligent and careless manner, as to its rate of speed and failure to sound ordinary signals of warning," and that the accident to the deceased was the result of the negligence of the defendant and its employees; "that before crossing or attempting to cross the defendant's railroad track [the deceased] used ordinary care, and did what an ordinarily prudent person would have done under the circumstances"; and that she "did not by her own carelessness or negligence in any way contribute to said acci-

[1] Cited in the note in 37 L. R. A., N. S., 139, on duty of traveler approaching a railway crossing as to place and direction of observation.

dent." But it is claimed by the appellant, in effect, that these are inconsistent with the more specific findings, and that upon the latter the conclusions of the court and the judgment should have been different. The case, as presented by the specific findings, is as follows: The defendant's railroad runs easterly along Humboldt street, in Los Angeles city, crossing at right angles Avenues 21 to 26, inclusive, and from the last crossing, leaving the street by a sharp curve to the northward. Humboldt street, between Avenues 22 and 23, is crossed at an angle of thirty degrees by "a wide, hard-beaten path, regularly traveled by pedestrians," which runs from a point on Avenue 23 south of Humboldt street, northwesterly, across vacant lots, to Avenue 22, in the vicinity of the house where the plaintiff and deceased lived. The distance along the path from its intersection with the south line of Humboldt street to its intersection with the railroad track is about thirty feet; and from the former point, looking easterly, one can see the track to the curve at Avenue 25, a distance of about eight hundred feet, but not beyond. The deceased was killed at the intersection of the path above described with the railroad in the afternoon of November 15, 1899, while it was still light, by a train coming from the east. She was then passing along the path to her home; and when she came to Humboldt street, and had entered thereon, "she looked up defendant's track in the direction from which the train . . . . was coming," and "there was [then] no train on the defendant's track in sight from where she was." The deceased then, without again stopping or looking up or down the track, proceeded to cross the street and railroad, following the path, and as she stepped upon the track was struck by the engine of defendant's train coming from the east, and fatally hurt. The train at the time of the accident was running downgrade, without using steam, and making but little noise—"at an excessively high and dangerous rate of speed" (between twenty-five and thirty miles per hour). No whistle was blown on the engine from the time it passed a point beyond the curve, out of sight of the deceased, until within ten or fifteen feet of her, and just as the engine was about to strike her; nor was the bell rung before or while crossing any of the streets until just above where the acci-

dent occurred. As the train rounded the curve "the engineer in charge of the engine . . . . saw [the deceased], and knew that she was walking on said path, and crossing said Humboldt street, ahead of said train, and that she gave no evidence of knowledge of the approach of said train," and, "notwithstanding said facts, . . . . did not slacken or lessen the speed of said train, or attempt to give [deceased] warning of its approach, . . . . until the train was within ten or fifteen feet of the point of the accident," though it is found he could have stopped the train within two hundred feet after starting to do so.

The above facts are not disputed by the appellant's counsel, except as to the rate of speed, the failure of the engineer to sound the signals required of him, and his failure to slacken speed until within ten or fifteen feet of the deceased. But on the last point the engineer's own testimony is explicit to the same effect as stated in the finding, and as to the others it is admitted that the evidence is conflicting.

The facts found must therefore be taken as established. We do not understand that this is disputed by the appellant; but the point made is that the deceased, after stopping at the south line of the street and looking up the track for an approaching train, should have again looked and listened for the approaching train, and that, as a matter of law, her failure to do so in itself constituted negligence. But it is difficult to imagine on what principle this contention could be sustained, or, if it could, how it could be material. On the question of contributory negligence the burden of proof is on the defendant; and here there was absolutely no evidence of such negligence, except that she did not look up the track for an approaching train in passing from the south line of the street to the track. Certainly we cannot say that the inference of negligence from these facts is irresistible, or, as a matter of law, that they constituted negligence; and unless this can be said, the contention must fail. For, to set aside the finding of the court that there was no contributory negligence on the part of the plaintiff, "such negligence must affirmatively appear as a conclusion of law from the undisputed facts": Schneider v. Market St. Ry. Co., 134 Cal. 482, 487, 66 Pac. 734 et seq. Indeed, in this case the evidence tended to show that the deceased took all the care

to avoid danger required of her. When she looked up the track and found it clear for the space of eight hundred feet, she was near enough to cross with safety, had the train been running at any but an excessive rate of speed.

I advise that the judgment and order appealed from be affirmed.

We concur: Chipman, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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## PEOPLE v. KLEE.

Cr. No. 889; July 9, 1902.

69 Pac. 696.

**Embezzlement by Bailee—Evidence.—Penal Code, Section 507,** makes it embezzlement for one to convert property intrusted to him as bailee. Section 511 provides that, on any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and under a bona fide claim of title, though such claim is untenable. On a prosecution for the embezzlement of a mare sold by defendant while in his possession, prosecutor testified that he intrusted her to defendant to have her for her keep until demanded; that prosecutor stated a price that he would sell the mare for, but that, in answer to a statement by defendant that he might buy the mare, prosecutor said that that would be "an after-consideration." Defendant testified that prosecutor stated that he might buy the mare at any time for $55. Defendant did not inform prosecutor of the sale of the mare, or remit any of the alleged price. Held, that the evidence was sufficient to sustain a conviction.

**Embezzlement by Bailee — Intent. — On a Prosecution** under Penal Code, section 507, making it embezzlement for one to convert property intrusted to him as a bailee, the question whether it was error to fail to instruct that defendant must have "feloniously" intended to appropriate the property was immaterial on appeal; the jury having been instructed that the test to be applied for determining the guilt or innocence of defendant was whether he intended to permanently deprive prosecutor of his property.

**Embezzlement by Bailee—Instruction.—On a Prosecution** under Penal Code, section 507, for the embezzlement of property by a bailee,

the court instructed substantially in the language of Civil Code, section 1572, which defines "fraud." Held, that though the section defines "fraud" within the meaning of the chapter relative to contracts, and had no application, there was no prejudice to defendant, the instruction being followed by one stating that the question was whether defendant intended permanently to deprive the owner of his property.

APPEAL from Superior Court, Ventura County; B. T. Williams, Judge.

Louis Klee was convicted of embezzlement and he appeals. Affirmed.

W. E. Shepherd for appellant; Tirey L. Ford, attorney general, and A. A. Moore, Jr., deputy attorney general, for the people.

HAYNES, C.—The defendant was tried upon an information for embezzlement, was found guilty, and appeals from the judgment and the order denying a new trial.

The property alleged to have been embezzled was a gray mare, the property of one J. C. Hickey, which had been intrusted to defendant on the 18th of October, 1901, "to use and care for as a bailee." A brief preliminary statement of facts is to the effect that the defendant was engaged in selling paper bags, twine, etc., through the country, carrying his stock in a covered delivery wagon, with one horse, and wished to get a second horse "for its keep"; that he obtained from the prosecuting witness, J. C. Hickey, in the city of Los Angeles, a gray mare, which he drove with his own horse, and at or near Saticoy, in Ventura county, traded her to one Willis for another horse, paying $25 "to boot," and continued on northerly, intending to go to Oakland, and was detained at Niles, in Alameda county, by a constable, upon information from Los Angeles. Defendant's contention is that he had an option to purchase the mare at a stated price, and was therefore authorized to dispose of her. The prosecuting witness, J. C. Hickey, testified that he was "engaged in buying and selling horses, keeping a sale stable"; that defendant advertised that he wanted a horse for its feed; that he went to see him, but he was absent; that he came to his stable that evening, looked at the mare, and seemed to like her, and an agreement was made that he should have

her for her feed, to be redelivered at any time he saw proper to make a demand upon him, "in three to five days, maybe a week, or longer," and wanted to know what territory he expected to go over; that he said he had just come back from a trip through the southern part of Los Angeles county and Orange county, and was going back over the same territory; that the mare was worth from $60 to $65, and defendant said he would take her; that nothing was said about purchasing the mare, "except he said, 'If this mare suits me after having driven her, I will buy her, as I have got to buy a horse.' I said, 'That will be an after-consideration' "; that there was no conversation with reference to selling the mare to him, or as to the matter of price; that he saw defendant driving the mare two days afterward, but did not see him again until he saw him in San Francisco, some three weeks afterward; that he went to Niles on the 7th of November, and caused his arrest in San Francisco on the 13th of November. Upon cross-examination he testified that defendant said: "If I like the mare after having driven her, what will be your price?" and that he replied, "That will be an after-consideration. Q. The price you made upon her was $65? A. Sixty dollars or $65—I don't remember—I told him; I don't remember what I said about it. Q. She was worth it? A. I considered her worth $65 Q. Either $55, $60 or $65, or thereabouts? A. I don't think I said anything about $55." He further testified that he got his mare back through information obtained by the sheriff from Mr. Willis, of West Saticoy, on November 8th; that he got the mare back about November 23d, and sold her for $62.50. On redirect examination Mr. Hickey testified: "Klee said, 'I may want to buy this mare if I like her after having driven her.' I said, 'That will be an after-consideration.' There was something as regards price; that is, his buying her. I told him that would be an after-consideration. I think that was the purport of it. There was no understanding or agreement between us, in any regard, in reference to the sale of the mare." L. E. Willis, with whom defendant traded the mare, testified that he met defendant near West Saticoy, and was asked whether he had a horse to trade. Defendant said he was working for a paper firm at Los Angeles, and that the team belonged to them; that he asked defendant if they had authorized him to trade and

to give boot, and he said they had, and the trade was made, the defendant paying $25 to boot; that he did not remember the name of the firm; that he said he was selling paper goods, and asked the road to Montalvo, and that he came from Los Angeles; that he surrendered the mare to Mr. Hickey, and got his horse from Niles. He said he would be back in four or five weeks or months, witness was not sure which. The defendant testified in his own behalf: That he told Mr. Hickey his business was that of selling paper bags. That he traveled in the country, north and south, and stayed out as long as his bags lasted. That Mr. Hickey showed him the mare, and said he sold her to a brick mason a few weeks before, and he took her back. "I said, 'If you say she will do my work, I will use her; but, before we go any further, I want to know the price that horse will be, in case I want to buy her, or if something should happen to her on the road.' He said, 'That is an after-consideration.' I said, 'Mr. Hickey, I don't do business that way. I must know what the horse will cost, or I don't want her. What will the price be?' He said, 'If that horse suits you, at any time you can buy her for $55.'" That on this understanding he started out on October 22d. That about ten miles east of Saticoy, where the sand was, she would not pull a pound, and stopped, and when he tried to get her to go she commenced to kick the sorrel horse, and that his horse pulled the load clear into Saticoy. That when he would hit her she would kick over the singletree. That he was on his way to Oakland, and expected to return in six or seven weeks with Mr. Hanson, a manufacturer of face lotions, with whom he had corresponded, and that he wanted to see his two little ones, and to arrange to send his oldest child to his father, in New York. That the horse he got from Mr. Willis was worth $25 more than the mare, and that he had not received that money back. That Mr. Hickey never made any statement to him as to the value of the mare, other than $55. That there was no secrecy in his movements at Saticoy. Then he told Mr. Willis the mare did not belong to him, but, under the claim that he had a right to buy the mare at $55, he traded her, without any intention of defrauding anybody, and intending when he got to Oakland to send Mr. Hickey the money. Upon cross-examination, defendant said he told Mr. Hickey that he was

going up north, wherever he could sell paper; that he intended to go to Oakland, but did not say so; that he heard Mr. Hickey's statement that he was to have the mare from three to six days, until he demanded her, but that was not true; that he wanted the horse for six or seven weeks; that Hickey said, "I may want to make a demand on you," and that he replied, "You can have her at any time if she does not suit me." Mr. Hanson, called by defendant, testified to a conversation with Mr. Hickey at Niles in which the latter denied that he said the price of the mare was $55, and said it was $70, and that witness offered to settle at that price, and that he was authorized to do so. Mr. Hickey was called by the defendant in rebuttal, and testified that he did not hear everything that was said unless people speak pretty loud, but he made it a point to know what was said.

Defendant's motion for a new trial was based upon the grounds: (1) That the evidence was not sufficient to justify the verdict; (2) that the court erred in its instructions to the jury; and (3) that the verdict is against law. The evidence is brought up by bill of exceptions.

The act of the defendant upon which the information is based was the trading of the mare to Mr. Willis, and the statute under which it was framed is section 507 of the Penal Code, which relates to embezzlement by a bailee. Defendant calls our attention to section 511 of the same code, which provides as follows: "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him." This section was embodied in an instruction requested by the defendant, and given to the jury, and presented the ultimate fact to be determined. It would be sufficient here to say that the evidence was materially conflicting, and that in such case the verdict of the jury should not be disturbed. In view, however, of the very earnest contention of counsel for defendant, we will briefly call attention to some of the facts which we think fully justified the conclusion embodied in the verdict. It may be conceded that the mare was for sale, and that Mr. Hickey stated a price that he would accept for

her; but there was no agreement to sell her, nor any color of authority given to the defendant to dispose of her while out upon his trip. Defendant was a stranger to Mr. Hickey, and there was no intimation that he would sell otherwise than upon payment in cash. There was nothing said from which the defendant could possibly infer that he might dispose of her and pay at some future time. It would seem well-nigh impossible that he could "in good faith" suppose or believe that he had a right to dispose of her as he did. But there are other facts which strengthen the conclusion reached by the jury. He was asked by Mr. Hickey where he was going, and said he had just returned from the southern part of Los Angeles county and Orange county, and was going back over the same ground. This is denied by defendant, who testified that he said he was going north; that he intended to go to Oakland, but did not say so, and expected to be gone six or seven weeks. Stress is laid upon the assumption that Hickey let defendant have the mare for the purpose of making a sale to him. But the evidence shows otherwise. Mr. Hickey testified that before defendant obtained her he had sold her to a brick mason, who undertook to drive her; that she reared and fell over and broke the shafts, and he took her back; and defendant testified that Mr. Hickey said he would let him have the horse, "to take down some of its fire." But he would not be likely to let her for a trip to Oakland and return for that purpose, or any other, for the compensation of having her fed. Only one other fact need be noticed. Defendant did not inform Mr. Hickey of the disposition of the mare, as he might have done by letter from Saticoy, as a man acting in good faith would have done, nor remit to him the alleged price of the mare. "We cannot say, as a matter of law, that the jury was not justified in finding the intent as alleged from the acts of the defendant, and the circumstances under which they were committed": People v. Johnson, 131 Cal. 514, 63 Pac. 842.

As to the instructions, it is contended that the jury were not instructed that, to constitute the crime, they must find that the defendant "feloniously" intended to appropriate the mare. It is not necessary to consider whether the omission of that word in the instructions requested by the prosecution constituted an error, since the jury were instructed at de-

fendant's request, "that if, from the evidence, you have a reasonable doubt as to the intention of the defendant being felonious and fraudulent, that doubt should be solved in favor of the defendant."

It is also contended that the reading of section 506 of the Penal Code as an instruction constituted prejudicial error. That section, it is true, relates to trustees and others intrusted with property for the use of other persons; but we see nothing in it that could mislead the jury, who were fully and accurately instructed as to embezzlement by a bailee.

So, defendant excepted to an instruction substantially in the language of section 1572 of the Civil Code, defining "fraud." That section, it is true, defines "fraud" within the meaning of the chapter of the code relating to contracts, and had no special application to the case, but did not prejudice the defendant; and following that instruction, which was given at the request of the prosecution, the jury were instructed, at defendant's request, that "the test of the law to be applied to the circumstances of this case for the purpose of determining the guilt or innocence of the defendant is, did he intend to permanently deprive the owner of his property?"

Three instructions requested by defendant were refused. We see no error in refusing them, as every matter contained in the first two had been given, and the last was properly refused. That request was based upon section 512 of the Penal Code. There was no evidence that the defendant restored the property before an information was laid before the committing magistrate, nor any evidence as to the date at which such information was laid.

Finding no error to the prejudice of defendant, I advise that the judgment and order appealed from be affirmed.

We concur: Cooper, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

## HURGREN v. MUTUAL LIFE INSURANCE COMPANY.*

S. F. No. 2045; July 15, 1902.

69 Pac. 615.

**Malicious Prosecution.—Where a Civil Action was Instituted Three Times,** but dismissed without trial, no action for malicious prosecution thereof would lie, as a judgment on the merits in defendant's favor is an essential element of the evidence of want of probable cause.[1]

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by E. W. Hurgren against the Mutual Life Insurance Company. From a judgment of nonsuit plaintiff appeals. Affirmed.

R. W. Miller for appellant; D. E. McKinlay and W. H. Sigourney for respondent.

TEMPLE, J.—Action for malicious prosecution of a civil action. The appeal is from a judgment of nonsuit. It is alleged by plaintiff that defendant solicited him to make application for $1,000 insurance, and that he was induced by the representations made to apply for $1,000, and agreed to pay an annual premium on the same of $53. After he signed the application, defendant raised it to a policy of $2,000, and subsequently tendered to plaintiff a policy for $2,000, upon which the annual premium was $103.40. Plaintiff refused to receive the policy or to pay the first annual premium, and thereupon defendant caused to be commenced against him three actions in succession, in each of which summons was duly issued and served on defendant. Each action was in turn, without a trial, voluntarily dismissed by the plaintiff (the defendant here). It is alleged that each action was commenced maliciously and without probable cause, and with intent to extort money from plaintiff. The motion for a nonsuit was based on the grounds: (1) There was no proof that defendant caused the actions to be brought; (2) that

*For subsequent opinion in bank, see 141 Cal. 585, 75 Pac. 168.

1 Cited in the note in 93 Am. St. Rep. 470, on the malicious prosecution of civil actions.

want of probable cause was not shown. The motion was granted upon the last-mentioned ground of the motion. In granting the motion the learned judge of the trial court remarked that, to establish want of probable cause for bringing the suit, it must appear that the suit which is alleged to have been maliciously brought has been decided on the merits in favor of the defendant in that action. Appellant is mistaken in supposing that the decision was upon a ground not specified in the motion. The statement was that a judgment on the merits against the party who brought the suit charged to have been malicious is essential, to show want of probable cause. The judgment was correct. The first suit was brought by the agent or solicitor in his own name, and, of course, it could not be maintained. There was no proof that the defendant had anything to do with it. The solicitor was not an accredited agent of the company, but was employed by one who was an agent to solicit business for him. The second suit was commenced in the name of the company, and, the plaintiff being a nonresident, a bond was demanded on its behalf, and thereupon the cause was dismissed. The third suit was brought by an assignee of the company, to whom it had been assigned for the purpose of collection. It was dismissed without a trial. The suits were brought upon a written agreement of this plaintiff to pay $103.40 per annum upon a policy of life insurance after delivery of policy. The policy had been made out and tendered to the plaintiff, and demand made for the premium. The defense was that plaintiff signed the agreement in blank, and the solicitor, without the consent of this plaintiff, filled in the blank for more insurance than he had agreed to take. There was no evidence which tended to show that the defendant or any of its agents, unless such solicitor was an agent, had any knowledge of such facts, if facts they were. The agency of the solicitor was not such that it could bind the company in a matter of that kind, and furthermore, as I have said, an essential element in the proof of want of probable cause was lacking, in that no judgment on the merits had been rendered in the alleged malicious suits: Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; Jones v. Jones, 71 Cal. 89, 11 Pac. 817.

The judgment is affirmed.

We concur: McFarland, J.; Henshaw, J.

## MOREHOUSE v. MOREHOUSE.*

S. F. No. 2876; July 15, 1902.

69 Pac. 625.

**Statute of Limitations—Oral Agreement.—Code of Civil Procedure**, section 360, relative to limitations, provides that no acknowledgment is sufficient evidence of a new contract by which to take a case out of the statute unless the same is in writing. Civil Code, section 1697, enacts: "A contract not in writing may be altered in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of a new alteration." One orally agreed to give another a certain sum in consideration of his moving off certain land, and thereafter the promisor stated to the promisee that he would pay the money as soon as convenient or as soon as he could get the money from a certain source, to which the promisee acquiesced, and there was nothing to indicate that the promisee was pressing payment. Held, that the agreement as to payment from a certain source was not a mere forbearance, and therefore not within section 360, but was either a new or continuing contract within section 360, or a material alteration within section 1697, and being oral did not prevent limitations from running against the promisee from the time of his removal.

**New Trial—Reconsideration of Evidence as to Limitations.**—The trial court has a right to reconsider the evidence before it, and to grant the new trial for the reason that the findings as to limitations rested only on certain evidence, whereas there was other material evidence which showed the findings to be without foundation.

APPEAL from Superior Court, City and County of San Francisco; Edward A. Belcher, Judge.

Suit by J. W. Morehouse against Clara Morehouse as administratrix of the estate of Le Grand Morehouse, deceased. From an order granting a new trial plaintiff appeals. Affirmed.

Geis & Albery and Mastick, Van Fleet & Mastick and W. B. Treadwell for appellant; Rodgers, Paterson & Slack for respondent.

PER CURIAM.—Defendant's intestate, Le Grand Morehouse, died October 22, 1898, and defendant was duly ap-

*For subsequent opinion in bank, see 140 Cal. 88, 73 Pac. 738.

pointed administratrix of his estate. It is alleged in the complaint that during his lifetime (date not given) Le Grand entered into an agreement with plaintiff as set forth in plaintiff's claim presented to defendant as administratrix, of which the following is a copy: "Estate of Le Grand Morehouse, deceased, to J. W. Morehouse, Dr. 1899. For the sum of five thousand dollars ($5,000) due claimant, J. W. Morehouse, from said estate, in accordance with an agreement made and entered into during the lifetime of said Le Grand Morehouse between said Le Grand Morehouse, deceased, and claimant, J. W. Morehouse, whereby said Le Grand Morehouse, deceased, agreed to pay to said J. W. Morehouse, claimant, the said sum of five thousand dollars if the said J. W. Morehouse would move off and deliver to said Le Grand Morehouse, deceased, the farm or ranch known as the 'Wrag Canyon Ranch' in Napa county, Cala., said claimant at said time residing on and farming said ranch, and did under and in pursuance to said agreement, move from, and deliver to said Le Grand Morehouse, said ranch, and the said sum has not been paid." The claim was duly verified September 11, 1899, and was thereafter presented to the defendant as administratrix, and was by her rejected October 10, 1899. The complaint alleges an agreement substantially as set forth in said claim, and avers nonpayment, and prays judgment for $5,000. The answer is a specific denial of the averments of the complaint; pleads subdivision 1, section 339 of the Code of Civil Procedure, in bar, and also pleads want of consideration.

The trial court found the allegations of the complaint to be true; that plaintiff was, at the time of making the agreement, lawfully in the possession of the ranch mentioned in the complaint, and lawfully entitled to such possession, and "that the said agreement was made in consideration that plaintiff should move off and deliver to said Le Grand Morehouse the farm or ranch; and said agreement was made upon and for a valuable consideration"; that the cause of action is not barred. Judgment was accordingly entered. A motion for a new trial was made, and the statement of the case settled and allowed by Judge Belcher, who tried the case. The motion was not heard, however, until after he retired from office, and upon hearing before Judge Sloss the motion was granted. The order states that it was granted "solely

upon the grounds of errors in law occurring at the trial and excepted to by the defendant, and upon the further ground that the evidence is insufficient to justify the finding that the plaintiff's cause of action is not barred by the provisions of section 339 of the Code of Civil Procedure, or by the provisions of any other statutes or law, inasmuch as such findings are based wholly upon evidence of a contract to pay when Le Grand Morehouse should receive five thousand dollars from Andrew Barron and from the Wrag Canyon ranch, and such contract, not having been pleaded, could not be effectual to take the case out of the operation of the statute of limitations." George Morehouse, brother of deceased and father of plaintiff, testified that deceased told him, in 1887, that he would purchase what was known as the "Wrag Canyon Ranch," in Napa county, for his, witness', son; that he would deed it to him when he paid for it; that the son would have all the time he wanted to pay for it—twenty years or more if it was necessary; that he should keep it in repair and pay the taxes; that deceased did purchase the ranch, and afterward plaintiff moved onto it; this place "in fall of the year 1887." This conversation, it testified, the witness had with deceased at the time of the purchase, and he communicated it to plaintiff, and he said "he would take it [the ranch] and move onto it, and he did so." So far as appears, deceased had no communication with plaintiff concerning the transaction, although he was on the place with the parties at the time of the purchase. There is no evidence that plaintiff paid any taxes levied on the ranch. Witness testified that plaintiff "remained on that place from 1887 until the fall of 1892," and witness testified that he repaired or rebuilt fences, repaired the barn, "fixed up the house," and made improvements which witness estimated of the value of $1,000. Plaintiff left the place in 1892, and the witness testified that shortly before he had a conversation at the place with deceased on the subject of plaintiff's leaving, and was told that "he had sold the place to Andrew Barron, and he wanted Judson [plaintiff] to get off"; "he said he had sold it for $40,000, and he wanted to get Judson off; . . . . he said he would pay him $5,000 to move off directly, or immediately, or as soon as convenient." This conversation was with witness alone, and he communicated it to plaintiff, who was there on the place but took no part in the conver-

sation, and he said, "'All right,' or something to that effect," and thereupon witness so informed deceased. Plaintiff moved off in the course of a week or ten days. Barron moved to the place in October, 1892, as he (Barron) testified, but under lease for two years, and there is no evidence that he purchased or contemplated purchasing the ranch. Witness George Morehouse further testified that several weeks after plaintiff moved away from the ranch deceased "said Judson had moved off, and he could not put his hand right down in his pocket and take out $5,000 at that time to pay him, but he would pay it as soon as convenient, or sooner; as soon as he could get it out of the ranch or from Mr. Barron he would pay it to him." He testified that this was communicated to plaintiff by witness, and he said "that was all right," and he also communicated to deceased this answer not long after. The matter seems to have stood in this position, so far as appears, from 1892 until in June, 1898; there is no evidence of any claim made meanwhile for this $5,000, or that any of the parties mentioned the matter one way or another. In June, 1898, the two brothers, witness and deceased, met in Glenn county on the Clark Valley ranch. Witness testified that at some time during the day deceased said: "'I have been keeping an account of the ranch question,' and Judson's money was due or about due—was due or about due—and he said, 'George, if you will go with me to-morrow morning to Stockton, I will collect the money, and I will pay it.' When he said he had been keeping an account of the ranch, the Wrag Canyon ranch is what he referred to." Witness did not go with deceased, and not long after deceased was taken sick. "He was up a good deal out and around, walking here and there, in the city and over to Alameda, backward and forward. I was with him all the time." Nothing further seems to have been said about the $5,000, and deceased died in October, 1898. On re-examination, he testified that plaintiff was present on the ranch, on the day of its purchase by deceased, in 1887, and heard deceased tell witness the terms on which plaintiff "could have the place." The only other witness to these transactions in any way corroborative of the foregoing was the wife of witness Morehouse; and she testified only as to one incident, namely, that she was at the house on the Wrag Canyon ranch, and heard some of a conversation

between deceased and her husband concerning her son's leaving the place. She testified that the conversation began in the dining-room, where "they talked [referring to deceased and her husband] about paying $5,000 to Judson Morehouse." She testified: "While they were talking there —they were there some time—I went out, and heard Le Grand Morehouse say, 'I will pay Judson the $5,000 if he will vacate the place and give me possession.' I did not hear any other part of the conversation; I was only there for a moment." Witness Turner, nephew of deceased, testified that he knew the ranch at the time his uncle purchased it, and he described the modest improvements on it; he testified that there were "about two hundred acres of level or farming land on the place. The rest of the ranch consists of sagebrush and mountains and rocks"; he was familiar with the ranch up to the time plaintiff left in 1892, and he testified that the place "was stocked some, at the time Judson took possession of it in 1887, with horses and cattle. There were farming implements there; the place was just as Clayton left it. There were two thousand two hundred acres in this place approximately." He describes the improvements made by plaintiff as slight. F. L. Morehouse, son of deceased, testified that he knew the ranch from the time of its purchase from Clayton by his father, and observed the condition of the improvements, and was on and off the place while plaintiff occupied it. He testified that plaintiff made no improvements to his knowledge, and that he would have seen them if made, "except there might have been minor improvements." Witness Turner testified that he took his uncle, deceased, and Mr. Barron to the ranch in 1892, at the time spoken of by witness George Morehouse, brother of deceased; "that there was trouble either between my uncle Le Grand and Judson or between my uncle Le Grand and my uncle George"; and Barron testified: "They [referring to deceased, George and Judson] had a conversation together at that time which I didn't hear. There was kind of hot words spoke betwixt them, and I stepped to one side. After that heated conversation occurred, Le Grand Morehouse and myself left the place, and walked up the lane quite a ways." He testified that he rented the property, and that his "tenancy began about the 1st of October, 1892." The foregoing appears from the testimony in chief of the witnesses, which

was all the evidence except that it was more or less shaken or strengthened by cross-examination. Plaintiff was not called as a witness to any of the facts in the case, and whether or not deceased paid the debt in his lifetime does not appear otherwise than in the verification to the claim presented to the administratrix.

According to the testimony of George Morehouse as to the terms on which his son gave up the place, there was no condition attached to the promise to pay plaintiff $5,000. The amount became due upon plaintiff's leaving the ranch, which he did prior to October 1, 1892. Some weeks later, deceased told his brother, according to the latter's testimony, that he would pay the money "as soon as convenient, or sooner; as soon as he could get it out of the ranch, or from Mr. Barron."

This evidence was objected to, and the ruling of the court in admitting it is assigned as an error of law—one of the grounds on which the motion was granted. Plaintiff contends that this was not a new contract, nor a modification of the former contract, but was merely an extension of time for the payment of the money due on the former contract, and is not within section 360 of the Code of Civil Procedure, and need not be pleaded. It is further claimed that the legal effect was that the debtor requested forbearance from the creditor, and the creditor agreed and did forbear, and this takes the case out of the statute: Citing State etc. Trust Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600. There was no evidence of any such request or of any forbearance. The court might, in granting the motion, either have refused to accept this uncorroborated testimony, or it might have interpreted it to mean no more than that deceased was not at the moment prepared to pay, but did not dispute the right of plaintiff to immediate payment. There is nothing in the record to show that plaintiff was pressing payment, or had demanded it after he left the ranch, or that deceased desired to change the terms of the original agreement. It does not appear how he came to make the statement testified to by his brother George. It seems to have been voluntarily suggested by deceased, and with no apparent motive, and for no apparent consideration, except that "he could not put his hand right down in his pocket and take out $5,000 at that time." The matter rested in this condition for nearly six years, during which time plaintiff seems not to have asked

for payment, and his father, who had been so prominent in the transaction, said nothing about it. When, in 1898, deceased again brought the matter up, not to plaintiff, but to George, it was to suggest readiness to pay; and although George was with his brother all of the time, from June until October, during the latter's illness, he did not mention the payment, nor offer to receive the money which his brother said he was ready to pay; and his brother seems not to have alluded to it again; and it was not until after his death that plaintiff took any steps to enforce payment. The change made in the contract as testified to by George Morehouse, we think, was a material alteration; and section 1697 of the Civil Code provides that "a contract not in writing may be altered in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the new alteration." In Thompson v. Orena, 134 Cal. 26, 66 Pac. 24, the claim against an estate was for services as an attorney in the year 1887, and the evidence was that it was orally agreed by decedent that she would pay the attorney when she sold the property described in the complaint. The court said that plaintiff was entitled to payment as soon as the service was performed, and the statute would begin to run accordingly; "and the cause of action could not thereafter be taken out of the operation of the statute by any oral agreement or promise": Citing Civ. Code, sec. 1697. If the subsequent agreement of deceased was a new or continuing contract it was within section 360 of the Code of Civil Procedure, and should have been in writing; and if it was an alteration, it fell within section 1697 of the Civil Code. It was one or the other, and in either case the evidence of an oral contract was inadmissible, and did not take the case out of the statute of limitations.

In granting the new trial, the court made the order upon the grounds of errors in law occurring at the trial, and also on the ground that the evidence is insufficient to justify the findings that the action is not barred by any statute, because, as the court said, the findings were based only upon evidence of a contract to pay when Le Grand Morehouse should receive $5,000 from the Wrag ranch or from Andrew Barron, whereas, as the court must have found, there was evidence of another contract, indisputably barred, which remained unchanged by any act of Le Grand in such manner as would

take it out of the statute. It is true, the court added the further reason that this second or modified agreement was not pleaded, and therefore could not be resorted to as taking the case out of the statute. Whether this latter reason is well taken or not is a question much argued. We do not think it need be determined. The trial court had a right to reconsider the evidence before it, and to grant the new trial for the reason that, in its opinion, the findings as to the statute of limitations rested only on certain evidence, whereas there was other and different material evidence which showed the findings to be without foundation. We think the objections made to the admission of evidence were sufficient to entitle the errors to be reviewed, and we also think the specification of insufficiency of the evidence to justify the decision was sufficient.

The appeal is from the order granting a new trial, and the order is affirmed.

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## EVANS et ux. v. DUKE.*

S. F. No. 2193; July 17, 1902.

69 Pac. 688.

**Vendor and Vendee—Fraud—Limitation of Actions.—Defendant in an Action** for balance of purchase price of a fruit farm is not barred by limitations from defending, and recovering by cross-complaint money paid, on the ground of fraudulent representations, not having till then discovered the misrepresentation as to amount of land, and become convinced of the falsity of plaintiff's representation as to the amount of profits he had realized from the land, and his representation, repeated year after year, that the reason defendant did not obtain such profits was due to his want of experience.

**Vendor and Vendee—Rescission.—False Representations of Vendor** that a certain number of acres of the land were under cultivation, and that he had for a number of years obtained certain profits from it, which were fifteen per cent of the purchase price, are ground for rescission.

**Vendor and Vendee—Rescission.—Judgment for Defendant in** action for balance of purchase money of land, which rescinds the contract, fixes the amount to be paid defendant, he being charged with

*For subsequent opinion in bank, see 140 Cal. 22, 73 Pac. 732.

rent to date, with interest thereon, and plaintiffs with the amount paid, with interest, and provides that on payment by them he shall deliver possession, subject to his right to enter to remove growing crops, empowers them, by paying the judgment, to prevent his retaining possession while they are paying interest.

APPEAL from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Hugh Evans and wife against W. H. Duke. Judgment for defendant. Plaintiffs appeal. Affirmed.

Joseph H. Skirm for appellants; Benj. K. Knight and Chas. M. Cassin for respondent.

PER CURIAM.—On August 30, 1893, the plaintiffs and defendant entered into a contract in writing by which the plaintiffs agreed to sell to the defendant certain real estate and some personal property thereon for the sum of $12,555, of which sum defendant paid on February 15, 1894, the sum of $6,310, with interest at nine per cent from the date of the contract, the remainder to be paid in three annual payments, to be made on the first day of January in each of the years of 1895, 1896 and 1897, with interest at six per cent. The other installments remaining unpaid, this action was brought by the plaintiffs to recover them, and a strict foreclosure was demanded. The defendant answered, and also filed a cross-complaint in which he alleged that he was entitled to and had rescinded said contract on August 9, 1898, for fraud on the part of the plaintiffs, and prayed judgment for the sum of $6,910 alleged to have been paid by him under said contract, and certain taxes and interest, less the rental value of said land. The alleged fraud consisted of certain representations alleged to have been made in August, 1893, and afterward. These representations were (1) that the land and personal property were of the value of $12,555; (2) that the yearly income from the fruit grown on said land had been for several years not less than $3,000 per annum; (3) that in said premises were included not less than sixty acres of cultivated land—forty acres thereof in fruit, and twenty acres thereof under cultivation for the raising of hay; (4) that the apples grown thereon had brought and would continue to bring between $1 and $1.25 per box; (5)

that the grape crop of 1893 would bring $1,000; (6) that the income from said premises would net at least fifteen per cent on the $12,555, judging from what it had netted in the past; and (7) that the reason why they wished to sell said property was that Mrs. Evans was an invalid, and by reason thereof they were compelled to reside nearer to Santa Cruz, so that she could receive proper medical attention. It was then alleged that the value of the land and personal property did not exceed $6,910; that the yearly income from the fruit had never exceeded $800; that there never had been more than thirty-five acres of land under cultivation; that the apples had never averaged more than fifty cents per box, and would not average any greater sum; that the said grape crop did not bring more than $200; that the income from said premises had not been and would not be more than one per cent per annum on $12,555; that the first year's income did not net anything, and did not exceed $800; that defendant apprised plaintiffs of that fact, and that plaintiffs stated to him that the reason why the same had not been more profitable to him was that he was inexperienced in fruit-raising, that it would take him three or four years to become experienced, and that after he had such experience the income from said premises would be as plaintiffs had represented to him; that the annual income from said premises from 1893 to and including 1897 did not equal the expenses; that in each of said years defendant informed plaintiffs that said premises did not net him anything at all; and that plaintiffs on each occasion replied as at first. Defendant further alleged that he had not had any prior experience in fruit-raising; that he knew nothing of the productiveness and quality and quantity of land; that he was ignorant of land values, and was not familiar with said tract of land; that he was almost totally deaf, which made it easy for designing persons to obtain an advantage over him in business transactions, and that he and the plaintiffs had been for many years intimate friends; and that he had implicit confidence in them. It was further alleged, to conform to the evidence, that these representations were not discovered by defendant to be fraudulent until the month of June, 1898. All these allegations of fraud were denied in the answer to the cross-complaint. Upon the trial a jury was called, and ninety-seven special issues were submitted to it,

and answered, and these, with few exceptions, were adopted by the court, and judgment thereon was rendered for the defendant, rescinding the contract of purchase. Plaintiffs' motion for a new trial was denied, and they appeal from the judgment, and from the order denying a new trial.

1. Appellants contend that the court erred in overruling their demurrer to the amended cross-complaint. This demurrer presented the question whether the cause of action therein stated was barred by the statute of limitations. The contract of sale was made August 30, 1893. The complaint was filed February 5, 1898. Notice of rescission of the contract was given August 9, 1898. The misrepresentation as to the quantity of land under cultivation was not discovered until June, 1898, and he was then convinced that the representation in regard to the profits represented to have been obtained by the plaintiff, and the reason for the failure of defendant to realize them, were both false and fraudulent. The discovery of the misrepresentation as to the quantity of land in fruit and of that cultivated for raising hay was accidental, and appears not to have been caused by suspicion of the honesty and truthfulness of the plaintiff. He knew he had been disappointed in results, but as to said profits he was deceived from year to year by the assurance that his failure to secure them was owing to his want of experience. A party who artfully continues his deception from year to year, and thus prevents an early discovery of his fraud, cannot be heard to insist that his victim is without remedy because he did not sooner discover it. Nor is this the ordinary case for relief upon the ground of fraud, which must be commenced within three years from the date of the fraud, or from the discovery of the facts constituting it. Here the plaintiff who procured the fraudulent contract seeks to enforce its executory provisions, and is thus asking affirmative relief. The statute of limitations does not bar the defendant from objecting to the validity of the contract upon the ground of fraud. "It is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and, when enforcement is sought against him, excuse himself from performance by proof of the fraud": Hart v. Church, 126 Cal. 479, 77 Am. St. Rep. 195, 58 Pac. 913. In the same case it was further said: "It is true, as appellant contends, that where a party

seeks rescission of a contract he must act with promptness, and that the question as to what is or is not a prompt effort to rescind must depend in each case upon its own peculiar facts." One who makes positive assertions without warrant cannot excuse himself by saying that the other party need not have relied upon them, unless the facts represented were equally or at least reasonably within the power of the other party to ascertain, but he must show that his representations were not in fact relied upon. "Every contracting party has an absolute right to rely upon the statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith": Dow v. Swain, 125 Cal. 674, 683, 58 Pac. 271, and cases there cited; also Bank of Woodland v. Hiatt, 58 Cal. 234; Sutherland on Damages, 586 et seq., and cases there cited. It was held in Fishback v. Miller, 15 Nev. 428, that, where representations made by a seller are shown to be material and false, it is for him to show that the buyer did not rely upon them, and that without them the purchase would have been made. In Porter v. Fletcher, 25 Minn. 493, it was held that, where the representation related to the size and location of lots which were the subject of negotiation, the plaintiff could not be charged with negligence for relying upon the representations, instead of consulting the recorded plat. It is too obvious to even require statement that the profits that had been realized from the land, and the value of the property, measured by such profits, were fully and exclusively within the knowledge of the plaintiffs, and were unknown to the defendant or to any other person. The value of the premises, which is often the mere expression of opinion, here professed to be based upon the net income of the land for a series of years, and therefore the statement that the net income would be fifteen per cent on $12,555 was something more than the expression of a mere opinion. The demurrer to the defendant's cross-complaint was properly overruled.

2. Appellants contend that the evidence fails to show any fraud on the part of the plaintiffs either before or after the

agreement was made. In other words, it is contended that the evidence does not sustain the findings in that behalf. As hereinbefore stated, a jury was called, and there were submitted to it ninety-seven special issues, covering every allegation of the pleadings and every alleged fraudulent representation, and the answers made by the jury fully sustain the allegations of the cross-complaint. These answers, with some modification of a few of them, were adopted by the court, and the findings of the court fully sustain the judgment. That the evidence was conflicting is clear, but in view of the fact that the jury, after hearing the evidence and inspecting the premises, found that each of the material representations charged to have been made by the plaintiff were made, and were fraudulent, and that these findings were approved by the court, it is not necessary that we should further discuss the evidence.

3. Appellants contend that the court erred in permitting the defendant to amend his cross-complaint to conform to the evidence. There were four of these amendments, each embodied in the order of the court, after the evidence was all submitted. These orders thus made by the court are equivalent to findings of the several facts to which they relate, and the rule relating to conflicting evidence should be applied. We think that each of these amendments was justified by the evidence and that the discretion to grant them was not abused.

4. It is said by counsel for appellants that there is no evidence that Mrs. Evans was guilty of any fraud. The record does not show whether she had any interest in the property other than as wife. She was, however, joined with her husband as plaintiff in the action, and was a party to the contract upon which the action was based, and did not repudiate any of the representations of her husband; nor does it appear that any objection was made in the court below to the judgment upon the ground that she had no interest in the property, and had not been guilty of any fraud.

5. It is contended by appellants that the judgment is unjust, in that defendant is allowed to retain possession of the property, while they are charged interest on the amount of the judgment against them. The judgment, after rescinding the contract and fixing the amount to be paid to the defendant, provides that, upon payment by the plaintiffs to

defendant and cross-complainant of the amount specified, the defendant should deliver possession of the personal property, "and also deliver to said plaintiffs the said land and premises described in said agreement, and the possession thereof, subject to the right of the cross-complainant to enter and use said premises for the purpose of removing therefrom all crops now growing thereon." The judgment recites the basis upon which the amount of the judgment was ascertained, namely, plaintiffs are charged with the amount paid on the purchase with interest, and the cross-complainant with rent of the property down to the date of the judgment at an annual rate, with interest thereon. Upon payment of the amount of the judgment the property is to be at once delivered, with the privilege to the defendant of entering to remove the crop then growing. It is therefore within the power of plaintiffs to secure the right to re-enter at once, and thus protect themselves against any possible hardship such as that suggested, even if the judgment would bear the construction given it by the plaintiffs—a point we have not considered.

The judgment and order appealed from are affirmed.

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## SHEEHAN, Tax Collector, et al. v. OSBORNE et al.

S. F. No. 2237; July 23, 1902.

69 Pac. 842.

**Taxation.—If a Judgment in an Action Against the Tax Collector** of a county, which adjudges an assessment void, and enjoins him and his successors in office from proceeding under the assessment, is binding on him—which it is not unless the county is bound thereby—he has a right to proceed by suit or otherwise to set it aside, as preventing his performing his duties.[1]

**Taxation.—An Order Dismissing a Suit to Set Aside a Judgment** adjudging an assessment void, and enjoining the county tax collector

[1] Cited with approval in Davidson v. Baldwin, 2 Cal. App. 736, 84 Pac. 239, the court referring to it "for discussion of the principle" that when persons are but the agents of the city and of the county and state, they are equally bound by the judgment.

**from proceeding under it, though entered by the plaintiff tax collector's attorney with his consent, will be opened for mistake on showing that he gave his consent in ignorance of his obligation to other parties interested, and that their interests would be prejudiced.**

**Tax Collector—Action by.—Though the Term of Office of Tax Collector Terminates** pending a suit by him, it may be prosecuted without substitution of his successor, Code of Civil Procedure, section 385, after giving the rule in case of death of a party, providing that in case of any other transfer of interest the action may be continued in the name of the original party.

APPEAL from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Suit by Edward I. Sheehan, tax collector of the city and county of San Francisco, and others, against George Osborne and others. From order denying motion to set aside a judgment of dismissal plaintiff Sheehan appeals. Reversed.

Lloyd & Wood, Page, McCutchen & Eells and Coogan & Kahn for appellant; Morrison & Cope, A. Heyneman, Naphtaly, Friedenrich & Ackerman and Garrett W. McEnerney for respondents.

SMITH, C.—This is an appeal from an order denying the appellant's motion to set aside a judgment of dismissal of date February 17, 1898. The dismissal was entered by the plaintiff's attorney, with the consent of the appellant, but it is claimed by the latter that in giving his consent he acted under a misapprehension of the law and of the facts, and of his obligations to parties represented by him, and for whose benefit the suit was brought. The dismissal suit was brought by Block, tax collector of the city and county of San Francisco, with the other plaintiffs, to set aside a judgment of date May 25, 1881, recovered by the defendant Osborne and the predecessors in title of defendants Schweitzer and the Crocker Estate Company against Tillson, then tax collector, adjudging the assessment known as the "Dupont Street Assessment" to be void, and enjoining the defendant and his successors in office from proceeding under the assessment to sell the lands of the plaintiffs therein. The present plaintiff Sheehan was substituted, pending the motion, as successor in office of Block. The other plaintiffs are owners and holders of Du-

pont street bonds, and sued in their own behalf and in behalf of all other owners and holders of such bonds. The case alleged in the complaint is substantially as follows: Prior to the date of the judgment in question, there were pending in the superior court of San Francisco against the tax collector twelve other suits in which the questions involved and the attorneys were the same as in the suit in question, and it had been stipulated in writing that two of these suits, namely, Lent v. Tillson and another, should be tried together as representative cases, the others to abide the result, and in each a like judgment in the trial court and on appeal be entered. The suits named were accordingly tried, and judgments entered for the plaintiffs, and thereupon judgments to the same effect were entered in the other cases, including the case in question here. Thereafter the judgments in the two representative cases were reversed by this court, whose judgment was affirmed by the supreme court of the United States: Lent v. Tillson, 72 Cal. 404, 14 Pac. 71, 140 U. S. 316, 35 L. Ed. 419, 11 Sup. Ct. Rep. 825. The remittitur was filed July 30, 1891, and the suit brought July 29, 1895. The stipulation, it is alleged, was by inadvertence not filed, and has been lost. According to the stipulation the judgment in question should have been set aside, and judgment in accordance with the decision of this court entered. But this was not done. Numerous affidavits were filed by the parties, which on some points sharply conflict; but it is claimed by the appellant that on the ultimate question involved there was no substantial conflict, and that it was an abuse of discretion in the court to deny the motion. The points urged by the respondents, except as to order of statement, are as follows: (1) The term of office of appellant having expired, this appeal, it is claimed, cannot be further prosecuted; nor can the present tax collector, who was elected under the charter, be substituted. (2) The affidavits being conflicting, the discretion exercised by the lower court cannot be reviewed. (3) The plaintiff's affidavit does not show a mistake, but, if anything, a fraud perpetrated upon plaintiff . . . . by his own counsel. (4) The motion should have been denied on the ground of laches. (5) The plaintiff Block had no interest in the litigation, and, being thus a mere nominal party, was not injured; nor (6) could he control the suit. Hence (7) plaintiff's attorney had power to dismiss

the action without his consent. (8) Finally, it is claimed the plaintiff Block was not a necessary or proper party to the suit.

It may be that the last point is well taken: Bailey v. Johnson, 121 Cal. 562, 54 Pac. 80. It is a question whether the judgment against the former tax collector could, as it purported to do, bind his successor in office. The tax collector is not a corporation sole, whose successors constitute the same fictitious person, and are, therefore, bound by a judgment against a predecessor, but a mere agent of a corporation aggregate—that is, of the county. There is no direct privity, therefore, between a tax collector and his successors in office, nor can the latter be regarded as "successors in interest" to their predecessors, for neither have any interest in the tax, nor, except as personally affected, in the question of its validity: Bailey v. Johnson, supra. It may be, indeed, where a judgment is recovered against a tax collector, enjoining the enforcement of the assessment on the ground of its invalidity, that the city and county will be estopped by it; and no doubt, if it has participated in the defense, and thus made itself the real party of record, it will be so estopped: Loftis v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 286, 66 Pac. 571. But under our code persons estopped by a judgment inter partes are divided into two classes, which seem to be exclusive of any others, namely, "the parties and their successors in interest by title subsequent to the commencement of action." The latter class corresponds to such privies only as are such by reason of "successive relationship to the same rights of property," and thus excludes privies by reason of "mutual . . . . relationship" to such rights (Bouv. Dict., art. "Privity," and authorities cited), who can be bound only, if at all, when they come under the description of "parties to the suit" (Code Civ. Proc., sec. 1908, subd. 2). If, therefore, the plaintiff Block was bound by the former judgment, it was not by reason of his being successor in office of the defendant therein, or of any other direct relation between the two, but because his principal, the city and county, and therefore himself as its present agent, was estopped. Whether, in fact, the city and county is bound by the judgment, need not, in its absence as a party, and in the absence of discussion in the briefs, be considered; but, if it be not bound, it is clear the plaintiff Block was not bound, and therefore had no cause

of action, and, upon this hypothesis, that the order appealed from should not be disturbed. But, assuming the contrary, and that, consequently, the former judgment is a valid judgment against him, operating to prevent him from performing the duties of his office (which is the respondents' theory), there can be no doubt that Block had the right to proceed to have it set aside.

There is another ground on which, perhaps, it might be held that Block had no cause of action. The stipulation on which the judgment was entered also provides, on the disposition of the appeals in the representative cases, for the entry of judgment to correspond with the judgment of this court; and we can see no reason at the present time why a judgment might not now be entered as stipulated. But the point not being argued by the counsel, we leave it without definite decision.

Other objections are urged to the sufficiency of the complaint, but these are such as, if well taken, might be cured by amendment; and it would therefore be improper to dispose of them on this motion.

From what has already been said we must regard as untenable the proposition that Block was a merely nominal party, and therefore had no control of the suit, and also the inference that the suit might be dismissed without his consent. The terms of the judgment expressly refer to him, and, if the judgment as to him was valid—which is the theory of respondent—he was in fact a party, and as such entitled to maintain a suit or other proceeding to vacate it. But he also represented in the suit his principal, the city and county, and indirectly all the bondholders, and must, therefore, a fortiori, have had the control, or right to control, the suit.

As to the appellant's showing on the motion to vacate the order of dismissal, we think it was sufficient. On many points the affidavits of the parties are conflicting, but the ultimate fact asserted in Block's affidavit is that in consenting to a dismissal he did so in ignorance of his obligations to other parties interested, and of the fact that their interests would be injuriously affected. This is not contradicted, but rather confirmed, by the affidavit of the attorney who obtained his consent to the dismissal; for this not only fails to show that Block was advised as to his obligations, but shows affirmatively that he yielded to the request on the ground that he

had become a party at the attorney's request, "and did not see why he could not dismiss these suits on the same request." There is no reason to doubt, therefore, that in giving his consent he was in ignorance of the effect of the dismissal on the rights of bondholders other than those represented in the suit; and, in view of the presumptions applying to the case (Code Civ. Proc., sec. 1963, subds. 1, 15), we cannot presume the contrary. Moreover, it is clear from the affidavits that he was not informed of his obligations to the county, his principal—a mistake in which the attorney seemed also to participate. We do not think there was any laches; nor do we think it material whether the mistake of the plaintiff Block was the result of mistake or of fraud.

The remaining point urged by the respondent is that the term of office of the appellant has expired, of which fact it is claimed the court will take judicial notice. This may be admitted, but it does not follow that the case cannot be prosecuted further, or that it cannot be so prosecuted without substitution of his successor in office. As to the latter point, the rule is different in case of the death of a party; but "in case of any other transfer of interest the action or proceeding may be continued in the name of the original party": Code Civ. Proc., sec. 385. If the succeeding party desires, he can make his application to be substituted; otherwise the suit will proceed without such substitution. This renders it unnecessary to consider the point that the present tax collector is not the successor of his predecessors elected under the former law, though we see no reason to doubt that he is.

We advise that the order appealed from be reversed and the cause remanded, with directions to the court below to vacate the order of dismissal and to reinstate the case.

We concur: Cooper, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed and the cause remanded, with directions to the court below to vacate the order of dismissal and to reinstate the case.

# PICKERING LIGHT AND WATER COMPANY v. SAVAGE.

L. A. No. 1079; July 24, 1902.

69 Pac. 846.

**Appeal—Specification of Error.—Where, on an Appeal** from an order denying a new trial, there are no specifications of insufficiency of evidence, the question whether the findings are supported by the evidence cannot be considered.

**Boundary—Evidence.—Where, in an Action to Determine a** boundary line, a witness has testified to a survey, the admission in evidence of a map made by him explanatory of such survey is not error.

APPEAL from Superior Court, Los Angeles County; W. F. Fitzgerald, Judge.

Action by the Pickering Light and Water Company against William E. Savage. The plaintiff had judgment and defendant appeals from an order denying a new trial. Affirmed.

William E. Savage in pro. per.; Chas. Monroe for respondent.

SMITH, C.—This is a suit to quiet title to the land described in the complaint. The judgment was for the plaintiff, and the defendant appeals from an order denying his motion for new trial.

The defendant is the owner of the southeast quarter of the southeast quarter of section 22, township 2 south, range 11 west, and the plaintiff, of the northeast quarter of the southeast quarter of the section named, and also of section 23 of the same township, adjoining section 22 on the east. The land in controversy is a strip of land along the eastern and northern boundaries of defendant's land, claimed by the plaintiff and the defendant, respectively, to be within their several tracts. The questions involved relate to the location of the southeast corner of section 22, and to an alleged practical location of the north and east boundaries of the section by a survey made by the plaintiff in the year 1887, agreed to or acquiesced in by the defendant. To the latter contention

the evidence cited by the appellant gives some color; but, unfortunately, with the best disposition to do so, we are precluded from examining the question by the lack of any specifications of insufficiency of evidence, with reference to the findings either on this or other points. The specifications of error are also, with one exception, insufficient to inform us as to the errors complained of. In the excepted case the ruling complained of was the admission of a map made by the witness, explanatory of a survey to which he had testified, and was clearly right.

We recommend, therefore, that the order appealed from be affirmed.

We concur: Haynes, C.; Gray, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

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## STAMBACH v. EMERSON et al. (WOODS, Intervener).*

L. A. No. 1070; July 26, 1902.

69 Pac. 856.

**Estate of Decedent—Mortgage to Pay Pressing Demands.**—Where there are several claims against a solvent estate, some of which are being pressed for immediate payment, and the property cannot be sold at once without great sacrifice, the probate court has jurisdiction to authorize a mortgage to pay off the pressing demands, the requirements of Code of Civil Procedure, sections 1643, 1645, that claims be paid in a certain order, as therein specified, having application to insolvent estates only.

**Estate of Decedent.—In an Action to Foreclose a "Probate Mortgage,"** the order of the probate court authorizing the mortgage cannot be questioned, where the court had jurisdiction to make such order.

APPEAL from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Ida V. Stambach against Frank N. Emerson, as executor of the estate of William Calder, and others, defend-

*For subsequent opinion in bank, see 139 Cal. 282, 72 Pac. 991.

ants, and Theo. Woods, intervener. From a judgment for plaintiff the intervener appeals. Affirmed.

Paul R. Wright and Wm. G. Griffin (Henry P. Starbuck of counsel) for appellant; Richards & Carrier and Canfield & Starbuck for respondent.

PER CURIAM.—This action was brought by the plaintiff to foreclose a "probate mortgage" made by the defendant Frank N. Emerson, as executor of the estate of William Calder, deceased, and Agnes Lee Emerson, the sole devisee under the will of said decedent, made pursuant to an order of the superior court. The other defendants, except Agnes Lee Emerson, hold liens against the interest of the Emersons as successors to the estate. The plaintiff answered the complaint in intervention, a trial was had, and the court found the amounts severally due the plaintiff, the intervener, and the other defendants, and ordered a sale of the mortgaged premises, and that the proceeds be applied—First, to the satisfaction of the amount found due to the plaintiff; second, to the amount found due the intervener; and, third, to the payment of the subsequent lienors in the order and amounts named. The intervener alone appeals.

The said mortgage was executed October 2, 1896, to secure a note of that date to the plaintiff for $2,000, with interest at ten per cent, payable quarterly. Agnes Lee Emerson, the sole devisee of the deceased, joined in the execution of the note and mortgage. There were three parcels of land belonging to the estate: The first (the parcel here mortgaged) appraised at $4,000; the second, at $2,000; and the third, at $400—in all, $6,400. The liabilities of the estate to creditors were: To the intervener, Theo. Woods, $1,500, unsecured; to Richard Hails, $1,000, secured by mortgage, executed by deceased in his lifetime, on the second parcel; to First National Bank of Santa Barbara, $1,000, unsecured; and to the Santa Barbara Savings and Loan Bank, $1,000, secured by mortgage—amounting in all to $4,500, besides some interest. The petition was for leave to execute the mortgage here in question for the sum of $2,000, for the purpose of paying the said claims of said banks, alleging that it was to the best interest of the estate that said property should not be sold; that there was then little or no demand for real estate; that said

banks were urging payment; that to force a sale of any part of the real estate would be ruinous to the interests of the estate; that the note to Theo. Woods, the intervener, bore interest at nine per cent per annum; and further alleged that "the interest thereon was paid up to that time," and that the holder thereof "does not require its immediate payment." The complaint in intervention sets out a copy of said petition and order, admits that the money borrowed from the plaintiff was used in extinguishing the claim of said banks, and alleges that the executor afterward sold said second parcel for $2,300, and said third parcel for $500, and with the proceeds paid the mortgage claim of said Hails in full, and paid intervener upon her said claim $1,000, and the court found there was unpaid upon her said claim, with interest, $630, and that there was unpaid upon plaintiff's claim $2,559.71 and costs of suit.

Appellant's contention is that the court had no jurisdiction to make said order authorizing the executor to execute said note and mortgage, and that they be declared void and of no effect in so far as said mortgage affects her claim against said estate.

Appellant's attack upon the judgment here in question is collateral, and must therefore fail, unless the order under which the loan was made and the mortgage executed was absolutely void. Appellant's special ground of objection is that the petition upon which the order was based stated that the loan was desired for the purpose of paying two specified claims, one of which was secured by mortgage, the other unsecured, appellant's claim being also unsecured. The petition alleged, however, that the claim of each of the banks was being pressed for immediate payment, while appellant did "not require immediate payment." Here was a special allegation made in the petition, explanatory of the fact that the amount specified was all that the exigencies of the situation required or justified. No question is made as to the sufficiency of the service of notice of the petition upon appellant, nor is there any allegation that while the service was sufficient in law, that in fact she had no knowledge of its pendency; nor is there in her complaint in intervention any denial of the allegation that she did not require immediate payment, notwithstanding a copy of said petition containing said statement is set out in her complaint in intervention, and must therefore have been

called to her attention. It would therefore appear to be inequitable that she should now be heard to assert, as against the lender, that the purpose to which a part of the money was applied was unauthorized, though it was paid to creditors whose claims are not assailed, except upon the ground that they were not secured, the contention being that the money borrowed should have been for the purpose of paying all unsecured creditors ratably. Appellant's complaint in intervention, however, does not allege that at the time said order was made said estate was insolvent, or that it is now insolvent. At the time the order was made no part of the real estate had been disposed of. The aggregate appraised value thereof was $6,400, and the aggregate indebtedness $4,500. The parcel mortgaged to the plaintiff was appraised at $4,000, and the other two parcels at $2,400. The two parcels last named were afterward sold by the executor for $2,800, an excess over the appraised value of $400. Out of the proceeds of this sale the claim of Richard Hails for $1,000, and $1,000 upon the claim of the intervener were paid, leaving unsatisfied only the claim of the plaintiff, upon which there was found to be due $2,559.71, and upon the claim of the intervener $630.90, aggregating $3,190.61. These sums, with the costs of suit, represent the unpaid indebtedness of the estate. The claims of the other defendants, who are designated as "subsequent lienors," are liabilities of Emerson and wife, and not of the estate, and they do not appeal. It is neither alleged nor found that the estate is insolvent, nor even that the market value of the property has depreciated. No equity of any character has arisen in favor of the intervener which should influence the court in its construction of the statute under which plaintiff's mortgage was executed. The money borrowed from the plaintiff was immediately applied to the payment of admitted debts of the estate, and did not in any manner increase its liabilities, nor prevent the intervener from compelling a prompt settlement of the estate.

It is not contended by appellant that the court has not power, in a proper case, to make an order authorizing the executor to borrow money, and to execute a mortgage upon property of the estate to secure its payment, but that in the case at bar the petition was fatally defective in that the purpose was stated to be the payment of two specified claims, and not for the payment ratably of all claims belonging to a speci-

fied class, citing sections 1643 and 1645 of the Code of Civil Procedure. The first of these sections classifies the liabilities against estates, and the second provides: "If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid." It is only in the case of insufficiency of assets to pay all the debts of any one class that dividends are required to be paid. Here there was neither allegation, evidence or finding that the estate was insufficient to pay all its debts in full. Upon no theory can appellant's contention be sustained other than utter want of jurisdiction to make the order authorizing the loan and the execution of the mortgage; for, if jurisdiction be conceded, error in making the order cannot avail the appellant upon this collateral attack, and even if it were permissible to attack the order upon that ground, it does not appear that appellant has suffered injury. The purpose of the statute is threefold: (1) For the protection of estates from unnecessary loss, while securing at the same time prompt payment of pressing creditors; (2) for the protection of the lender, who naturally relies upon the validity of the order of the court authorizing the loan; and (3) for the protection of titles against collateral attack. These considerations require that a liberal construction be given to the proceedings of the superior court, and that errors in the exercise of its jurisdiction in such cases, when committed, should be corrected by a direct proceeding for that purpose.

We think the petition in this case was in substantial compliance with the statute. The judgment is therefore affirmed.

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## BARKLEY-GRAY GROCER CO. v. KELLEY CIGAR CO.

L. A. No. 1083; July 28, 1902.

69 Pac. 852.

**Sale by Sample—Breach of Contract—Evidence.**—Unequivocal testimony of purchaser's agent that cigars shipped were greatly inferior to samples, thus breaking contract, is not contradicted by tes-

timony of defendant's agent that samples used were honestly selected by him, without intention to defraud, and of persons claiming to be experts that cigars of the same brand shown in court were good cigars, and of a former salesman of the manufacturer that it made only one class of cigars, and all of the same quality.

APPEAL from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Barkley-Gray Grocer Company against the Kelley Cigar Company. From an order denying plaintiff a new trial he appeals. Reversed.

Chas. H. McFarland for appellant; John D. Pope and A. L. Hawes for respondent.

SMITH, C.—The suit was brought to recover damages for the defective quality of goods sold by defendant to plaintiff under contract set out below, and the judgment was for defendant. The plaintiff appeals from an order denying his motion for a new trial. The following is the contract between the parties, so far as material:

"Los Angeles, Cal., Aug. 8th, 1899.

"We agree to consign to Barkley & Gray Grocer Co., 100 M., more or less, 'Uncle Josh Weathersby Cigars,' and furnish our own salesman to travel with salesman of Barkley & Gray G. Co. to place the cigars with the retail trade. All orders are to be signed by the purchaser, and taken on Kelley's regular order blanks. Barkley & Gray Grocer Co. are to pay for such cigars as are accepted by the credit men and shipped out. The balance of the cigars remaining unsold are the property of Kelley Cigar Co. The goods are to be sold not subject to countermand. All sales are bona fide and not returnable. The cigars are to be sold at not less than $35.00 per M. Terms of discount to the jobbers are: 10 per cent. trade and 4 per cent. cash discount—goods delivered by Kelley Cigar Co. All accounts to be discounted are closed by 60-day acceptance. . . . .

"Signed in duplicate.

"KELLEY CIGAR CO.,

"By C. E. LAZIER.

"BARKLEY & GRAY GROCER CO.,

"M. J. BARKLEY."

Samples of the cigars were exhibited to the plaintiff at the time of the transaction by the defendant's agent, and similar samples were used by the salesmen of plaintiff and defendant on sales made under the contract to merchants in Arizona and this state, and for the goods sold plaintiff paid the defendant in full. But it is alleged the cigars sold were inferior to the samples, and were returned to plaintiff by its customers, who refused to pay therefor. It is found by the court that the defendant agreed that the cigars to be delivered to plaintiff should be equal to the samples exhibited to plaintiff by defendant, and that there was a similar agreement by the salesmen of the plaintiff and defendant with the parties to whom sales were made. But it is also found that the cigars delivered by the defendant to the plaintiff, and by the plaintiff to its customers, were equal to sample; and whether this finding is justified by the evidence is the only question in the case. On this point, Barkley, who acted in the transactions in question on behalf of the plaintiff, and the various parties to whom the goods were sold, eight in number, testify unequivocally that the cigars were greatly inferior to the samples, and their evidence is strongly confirmed by the circumstances of the case. Nor do I find in the record any evidence contradictory, or tending to contradict, either directly or indirectly, their testimony. The testimony of Lazier, defendant's agent, tends indeed to show that the samples used were honestly selected by him, without intention to defraud; and several witnesses, claiming to be experts, testified that cigars shown them in court, of the same denomination or brand as those sold, were good five-cent cigars; and another witness testified that he had formerly been connected as traveling salesman with the Binghampton Cheroot Company, the manufacturers of the cigar in question, and that the company made only one class of cigars, and all of the same quality. But there was no testimony on behalf of the defendant as to the quality of the cigars returned to the plaintiff, or as to how they compared with the samples. There was therefore no substantial conflict in the testimony on this point, and the finding should have been for the plaintiff.

We advise that the order appealed from be reversed and the cause remanded to the lower court for a new trial.

We concur: Gray, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed and the cause remanded to the lower court for a new trial.

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## ALLEN et al. v. McKAY & CO. et al.*

S. F. No. 2272; August 28, 1902.

70 Pac. 8.

**Adverse Possession—Claim of Title.—Code of Civil Procedure, Section 321,** provides that in every action for the recovery of real property the person establishing legal title is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been in subordination to the legal title, unless there has been adverse possession for five years. Held, that where, in a suit to recover realty claimed by defendant by adverse possession by herself and predecessors, there was evidence sufficient to overcome the presumption in favor of plaintiff raised by the statute, but one witness testified that one of defendant's predecessors, in answer to a direct question by plaintiff's attorney, stated he did not claim title, and accepted a license to use the land, and it appeared that another predecessor also disclaimed, the jury were justified in finding that defendant's predecessors held in subordination to plaintiff's title.

**Adverse Possession—Landlord and Tenant.—Code of Civil Procedure, Section 326,** provides that when the relation of landlord and tenant has existed the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the time of the last payment of rent, though the tenant may have claimed to hold adversely. Held, that where one holding land jointly with others in subordination to the title of the owner secures a deed from the others of their interests, it will not be presumed that she then set up an adverse claim, or that the character of her possession was changed.

**Adverse Possession—Evidence.—Where Land was Claimed by Adverse** possession, and the only evidence of actual adverse possession was testimony of defendant's superintendent that "we claimed title to the land in defendant," the evidence was insufficient.

**Appeal.—Where on Appeal a Question has Been Held to have Been One** for the jury, and on a second trial the jury, on the same

*For subsequent opinion in bank, see 139 Cal. 94, 72 Pac. 713.

and additional evidence in support of their prior finding, have found the same way as before, the finding cannot be questioned.

**Taxation.—A Blank Form of the Statement** under oath, required of owners of property by Political Code, section 3629, unsigned by them, on which is written an unsigned memorandum containing a description of the property, and under the head of "Value of Real Estate" the figures "20,000," and under that of "Value of Improvements" the figures "800," the dollar-mark not appearing, did not constitute an asessment of the property, which could be effected only by the insertion in due form in the completed assessment-book, and the certification of the latter by the assessor, as required by section 3652.

**Taxation—Description of Land.—Political Code, Section 3650,** relative to taxation, provides land shall be described in the assessment-book by township, range, section or fractional section, and when not a congressional division or subdivision, by metes and bounds, or other identifying description. Held, that a description by township, range and section, in connection with official surveys and plats, was sufficient.

**Adverse Possession—Pleading Title by.**—Code of Civil Procedure, section 437, provides an answer must contain a denial of the allegations of the complaint and statement of any new matter constituting a defense or counterclaim. Held, that in a suit for possession of realty a claim of title by prescription, in order to be taken advantage of, should be pleaded.

**Adverse Possession—Presumption.—Where in a Suit to Recover Possession** of land defendant claims title by prescription, but there is no evidence of an adverse claim, her user is, under Code of Civil Procedure, section 321, to be presumed in subordination of plaintiff's title. The presumption is not defeated by a deed to defendant which conveyed not an easement, but the title, taken in connection with circumstances tending to show the deed not bona fide.

**Adverse Possession — Payment of Taxes.—Where Defendant Claimed** by adverse possession, but it appeared she had not paid taxes as required, refusal of instructions as to adverse possession were harmless.

**Adverse Possession—Defendant in a Suit to Recover Possession** of land claimed an easement, and the court instructed that the easement could only be sustained by proof of adverse possession for five years, and that, to have been adverse, it must have been asserted under a claim of title with knowledge and acquiescence of plaintiff. Held, that the instruction was not misleading in connection with the following instruction, in which the court charged that it is not necessary to prove actual knowledge, but is sufficient if the adverse claim made and the facts were such that the plaintiffs ought to have known of their existence.

**Adverse Possession.—Where, in a Suit to Recover Possession** of land used by defendant's grantors, in connection with their mill

for booming purposes, the defendant claimed by adverse possession of the grantors, whose deed to defendant was of the mill and "appurtenances," it was not error to refuse to permit defendant to prove that mills are usually conducted with booms, and that their use is customary; there being no question as to the fact that the land in dispute was used with the mill in such a way that, assuming it to have been owned by the owners of the mill, or in their adverse possession, it would have been appurtenant thereto.

**Trial.—Remarks of Counsel, Which the Jury were instructed to disregard, are no ground for reversal.**

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Aaron C. Allen and others against McKay & Co. and others. From a judgment for plaintiffs and from an order denying a new trial defendants appeal. Affirmed.

Mastick, Belcher & Mastick for appellants; Knight & Heggerty, Geo. C. Sargent, S. M. Buck and J. F. Coonan for respondents.

PER CURIAM.—This is an appeal from a judgment for the plaintiff in an ejectment suit and from an order denying the defendants' motion for a new trial. The case was before this court on a former appeal by the defendants, resulting in a decision in their favor, reported 120 Cal. 333, 334, 52 Pac. 828, to which reference may be made for the facts of the case. To the statement there given it must be added that the Occidental Mill Company was originally the property of Evans & Co., then of McKay & Co. (composed of Allen McKay, Connick and Sinclair; the interest of the first being three-fourths, of the second three-eighths, and of the third one-eighth), and then of the original defendant Rebecca McKay (grantor of the present defendant, McKay & Co.), who, upon the death of McKay, as his widow, had succeeded to his interest, which was distributed to her May 27, 1887, and who had subsequently, by deed of date September 12, 1888, succeeded to the interests of Connick & Sinclair. The sole defense on the former as on the last trial was the statute of limitations; as to which it is stated in appellants' brief: "The defendants . . . . relied: (1) On an adverse possession in fee by Rebecca McKay from April 30, 1889, to April 30, 1894; (2) on an

adverse enjoyment by her, for the same period, of the easement of storing logs on the property, and of maintaining thereon a boom for that purpose; and (3) on an adverse possession by their predecessors from 1871 to 1877." With regard to the last claim, the appellants' counsel, "to avoid trespassing on the time of the court, . . . . omit . . . . discussion," and we will do the same. But it may be said generally that the evidence cited by the counsel for the respondent was at least sufficient to justify the verdict in this particular. It remains only to consider the claim of adverse possession by Mrs. McKay, and the alternative claim of an easement acquired by her by prescription.

With regard to the former, it is claimed by respondent's counsel that "the most important, and practically the only, question as to the adverse possession of Rebecca McKay is whether or not any tax was assessed against this property for the year 1889, and, if so, whether it was assessed before or after April 30, 1889." But it is also an important question whether her possession was otherwise adverse—i. e., under "claim of title exclusive of other right"—and we are cited to no evidence of such claim. Nor is the subject discussed by the counsel; though the contrary is claimed by the respondent's counsel, and testimony cited tending strongly to support their position. Assuming, however, for the purposes of the decision, that with reference to the predecessors of Mrs. McKay there was such evidence, and of a kind sufficiently cogent to overcome the presumption to the contrary (Code Civ. Proc., sec. 321), yet it appears from the testimony of one of the witnesses, uncontradicted on this point, that in the year 1878 Allen McKay, in response to a direct inquiry from the witness, as attorney of the plaintiff, stated, in effect, that the firm did not claim title to the land, but merely wanted to use it for boom purposes, and accepted from the witness a license to continue such use; and from the testimony of the same witness it also appears that in the years from 1883 to 1885 Sinclair, another partner, on behalf of the firm, also disclaimed, and made a proposition to purchase the land from the plaintiffs. The jury was therefore justified in finding, with reference to the period anterior to the accession of Mrs. McKay to the property of the firm, that it was held by them in subordination to the plaintiff's title, which leaves for consideration only the subsequent claim of Mrs. McKay. In

this connection much stress is laid by appellants' counsel on the deed to her from Connick & Sinclair of date May 27, 1887, which, besides conveying to her the interests of the partners in the property of the firm, purported also to convey to her a tract of land, which is claimed by the counsel, and for the purposes of the decisions may be assumed, to be the land or part of the land in question; the claim being that Mrs. McKay entered on the land in controversy under this deed, and also that she entered under adverse claim of title founded on it. But we are cited to no evidence in support of either proposition, nor have we been able to find any. As to the former, it is clear from the evidence that she originally became possessed of the property in common with Connick & Sinclair under the decree of distribution, and that her possession was thus, like theirs, in subordination to the plaintiff's title; nor can it be assumed from the mere fact of the deed, in the absence of other evidence, that the nature of her possession was changed, or that she then or subsequently (prior to the payment of taxes in 1890) set up an adverse claim to the land. But, on the contrary, the presumptions are all the other way: Code Civ. Proc., secs. 321, 1849, 1963, subd. 19, and sec. 326. Nor have we been cited to, or been able to find in the transcript, any evidence of such claim on her part. The only evidence we have found approaching the subject is the testimony of Loggie, superintendent of the mill, who says: "I have never, since September 12, 1888, seen anybody in the possession of that place, except McKay & Co. Nobody that I know of came there and claimed possession until notice was served on us about a year before this suit was commenced. We claimed title to it in Mrs. McKay from that time down to now." Here, possibly, the reference intended by the witness was to the former date, September 12, 1888, and not to the "year before the suit"; though such is not the grammatical construction, nor can we say that such was the intention of witness; nor, if it were, would the evidence be of a very convincing character. It must be held, therefore—whether the land in question was assessed for the year 1889, before or after April 30th of that year—that the verdict is sustained by the evidence. With regard to the date of the assessment of the land in question for the year 1889, it was held by this court on the former appeal, on the evidence then before it, that this was a question for the jury, and the judgment was

reversed on the ground that the court had refused to give an instruction asked by the appellants on this point. On the new trial this instruction was given by the court, and the jury, on the same evidence that was given on the former trial, and additional evidence introduced by the respondents tending to show that the assessment was made subsequent to April 30th, again found in favor of respondents. We cannot, therefore, without disregarding the former opinion, question the finding of the jury on this point; for if, as claimed by respondents' counsel, the evidence then and now before the court was "conclusive on the subject," it could not have been held to be a question for the jury. This consideration disposes of the question; but to prevent misunderstanding of the decision of this court on the present and on the former appeal, and as bearing on the subject of the instructions hereafter to be considered, some further observations will be appropriate.

On the former trial, the only evidence upon the question before this court was the testimony of Wallace, the assessor, and the document introduced in connection therewith. This witness testified that the assessment in question "for the year 1889 was made upon the seventh day of March of that year," and in connection with his testimony the witness produced and the defendants read in evidence "the said assessment"; but the document itself does not appear in the statement and was therefore not before this court. In the record now before us the document itself is set out, and it thus now appears that it was not an assessment, but merely a blank form of the statement under oath, required of the plaintiffs as owners of property by section 3629 of the Political Code, unsigned by them, on which is written an unsigned memorandum containing a description of the property, and under the heading "Value of Real Estate" the figures "20,000," and under that of "Value of Improvements" the figures "800"—the dollar-mark not appearing. This manifestly did not constitute the assessment of the property, which could be effected only by the insertion in due form in the completed assessment-book, and the certification of the latter by the assessor either by the affidavit prescribed by section 3652 of the Political Code or by some other mode of authentication: People v. San Francisco Sav. Union, 31 Cal. 139; People v. Stockton & C. R. Co., 49 Cal. 421. It may be added that it now appears from

the testimony of the deputy assessor, Carr, that the entry of the assessment in the assessment-book was subsequent to the time the witness began to make up the assessment-roll for the township, which was not until "the first part of May or the latter part of April," and that the assessment was not completed until the morning of the first Monday of July, on which day it was for the first time signed or certified by the assessor. It also appears from the assessment-book itself that the so-called assessment entered on the statement of the property of the plaintiffs was not inserted therein, but other figures, with the dollar-mark attached, showing a different valuation of the property, viz., "$15,000." It is therefore now manifest that the property was not assessed until after the thirtieth day of April, 1889; and hence it is clear—assuming the validity of the assessment—not merely that the verdict of the jury was justified by the evidence, but that it appears conclusively from the evidence that the plaintiffs' cause of action was not barred by the adverse possession of Mrs. McKay.

Nor can the contention of the counsel for appellants that the description of the property assessed is insufficient, and the assessment consequently void, be admitted. The land is described by township, range, section and fractional section, as in the patent, which, in connection with the official surveys and plats, is sufficient: Pol. Code, sec. 3650. The expression "a congressional division or subdivision," used in the section cited, refers, not to divisions and subdivisions as actually surveyed by the United States surveyor general, but to the divisions and subdivisions provided by act of Congress—such as townships, sections, etc.—and is therefore to be construed as synonymous with the preceding clause, "township, range," etc. The act is therefore to be understood simply as requiring that the description shall be either "by township, range," etc., or by metes and bounds, or some other description sufficient to identify it. And this construction seems to be required by reason of the act, for it is clear that a description by government subdivisions is quite as sufficient a description of public lands of the state as of public lands of the United States; nor can it be supposed that the legislature intended to accord less weight to the acts of officers of the former than to those of officers of the latter.

With regard to the claim of prescription, it may be observed that it is in fact not pleaded, and hence that the question was not at issue in the case (Code Civ. Proc., sec. 437); but the jury were instructed as though the matter was in issue, and the case will be considered on that hypothesis. But, as we have pointed out, there is no evidence tending to show an adverse claim to the land on the part of Mrs. McKay; nor is there any evidence tending to show a claim by her to an easement in the land. The presumption, therefore, is that her user, as her possession generally, was in subordination to the plaintiff's title (Code Civ. Proc., sec. 321); and this presumption is strongly supported by the affirmative evidence that the possession of her predecessors was under the license of the plaintiffs. Nor is the presumption affected by the deed referred to, which purports, not to transfer an easement, but to convey the land, and which, under the circumstances of the transaction, and in the absence of any explanation as to the motives of the parties, can hardly be regarded as a bona fide transaction. It is rather to be regarded merely as one of the private means by which (to use the language of Connick) the parties to the deed "were preparing to hold [the] property if [they] could possibly do so." The verdict of the jury, therefore (if we regard the matter as in issue), was in this respect also *fully* justified by the evidence.

Of the alleged errors as to instructions, some refer exclusively to the claim of adverse occupation by Mrs. McKay during the five years preceding the commencement of the suit, April 30, 1894; and as it appears from uncontroverted evidence that she did not pay the taxes assessed on the land in the year 1889, her case could not have been helped by the instructions refused, or hurt by those given, and the errors, if any, must therefore be regarded as immaterial.

Other instructions refused were clearly covered by the instructions given. Of the instructions objected to—two in number—one is not very happily expressed, but, taken in connection with the instruction immediately following, cannot be regarded as misleading. In the former the jury are instructed with reference to the claim of easement that it could be sustained only by proof of adverse possession for five years, and that, "to have been adverse, it must have been asserted under a claim of title or right with the knowl-

edge and acquiescence of the plaintiff." But the remaining portions of the instruction refer to the acts from which such knowledge should be inferred, and in the next instruction the jury is instructed that "it is not necessary to prove actual knowledge; it is sufficient if the adverse claim made and the facts were such that the plaintiffs ought to have known of their existence." The other instruction objected to does not seem to be open to objection.

The objections to the rulings of the court as to evidence are also untenable. The court did not err in refusing to permit the defendants to prove by the witness Way that mills are usually conducted with booms, and that their use is customary. There was no question as to the fact that the land in dispute was used with the mill in such a way that, assuming it to have been owned by the owners of the mill, or in their adverse possession, it would have been appurtenant thereto. Nor, without the evidence, could there be any doubt in the minds of the jury that, assuming the ownership or adverse claim of ownership by the owners of the mill, their interests or claims passed by the deeds. The objections to what was said by Mr. Buck, the counsel for the plaintiff, with reference to the map introduced by Shaw, are also without ground. The court instructed the jury to disregard remarks by counsel. Nor, indeed, do we see anything objectionable in what was said by the counsel, which was designed merely to bring out a point on which he proposed to contest the correctness of the map, and thus to direct the attention of the court and jury to the question thus raised. The remaining objection relates to a question asked the defendant Carr with relation to the supposed assessment of the land of date March 7, 1889. But as it is clear from the evidence now before us that this under no circumstances could have constituted an assessment, the ruling could not have affected the case.

For the reasons given, the judgment and order appealed from must be affirmed, and it is so ordered.

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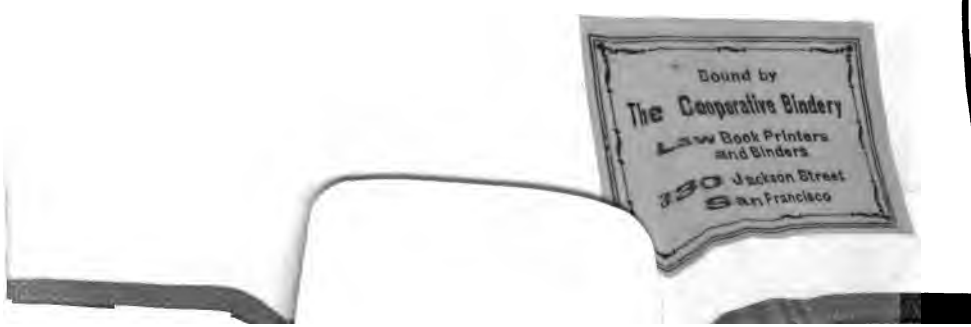

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